2010

Alliant Techsystems, Inc. v. Salt Lake County Board of Equalization, Utah State Tax Commission, and Granite School District : Brief of Appellee

Utah Court of Appeals

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BEFORE THE UTAH SUPREME COURT

ALLIANT TECHSYSTEMS, INC., Appellant/Plaintiff, vs. SALT LAKE COUNTY BOARD OF EQUALIZATION, UTAH STATE TAX COMMISSION, and GRANITE SCHOOL DISTRICT, Appellees/Defendants.	Case No. 20100029 Third District Court No. 030917933

BRIEF OF APPELLEE SALT LAKE COUNTY BOARD OF EQUALIZATION

Appeal from the Final Order of the Third Judicial District Court, State of Utah,
Honorable Jon M. Memmott, Tax Judge, Presiding

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LIST OF PARTIES

The parties consist of Appellant, Alliant Techsystems, Inc. (hereinafter "ATK"), the Salt Lake County Board of Equalization (hereinafter "County"), the Utah State Tax Commission and the Granite School District.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 59-1-608 and Utah Code Ann. § 78A-3-102(3)(j) (West 2009).

STATEMENT OF ISSUES ON APPEAL

ISSUE 1: Did the District Court correctly rule that Petitioner Alliant Techsystems, Inc. ("ATK") is subject to the privilege tax assessed under Utah Code Ann. § 59-4-101 for tax year 2000, where (1) ATK possessed and beneficially used real property owned by the United States Navy ("NIROP Property") to manufacture rocket motors for private companies pursuant to a Facilities Use Contract that allowed ATK to use the NIROP Property on a rent-free non-interference basis, and where (2) no other private company used the NIROP Property for any purpose and no other entity had a facilities use contract permitting use of the NIROP Property?

[Issue preserved: R. 1082-1084]

Standard of Review. Appellate courts review summary judgment determinations for correctness, granting no deference to the district court's legal conclusions; appellate courts determine only whether the district court erred in applying the governing law and whether it correctly held that there were no disputed issues of material fact. *Salt Lake County v. Holliday Water Co.*, --- P.3d ----, 2010 WL 2332985 Utah, 2010 (quoting *Hansen v. Am. Online, Inc.*, 2004 UT 62, ¶ 6, 96 P.3d 950 and *Kouris v. Utah Highway Patrol,* 2003 UT 19, ¶ 5, 70 P.3d 72).

ISSUE II: Did the District Court correctly determine that ATK did not have standing to raise the Supremacy Clause challenge based on federal government immunity from taxation?

[Issue preserved: R. 1085]

Standard of Review. Appellate courts review summary judgment determinations for correctness, granting no deference to the district court's legal conclusions; appellate courts determine only whether the district court erred in applying the governing law and whether it correctly held that there were no disputed issues of material fact. *Salt Lake County v. Holliday Water Co.*, --- P.3d ----, 2010 WL 2332985 Utah, 2010 (quoting *Hansen v. Am. Online, Inc.,* 2004 UT 62, ¶ 6, 96 P.3d 950 and *Kouris v. Utah Highway Patrol,* 2003 UT 19, ¶ 5, 70 P.3d 72).

ISSUE III: Did ATK preserve its issue and argument on appeal that it was economically impacted and thus had standing in its own right to assert a violation of the Supremacy Clause under the Doctrine of Pre-emption?

[Issue not preserved]

Standard of Review: If an issue is not preserved, appellate court will not address its merits "absent plain error or exceptional circumstances." *Utah Dept. of Transp. v. Ivers*, 218 P.3d 583(Utah 2009) quoting *State v. Rhinehart*, 2007 UT 61, ¶ 21, 167 P.3d 1046. "Exceptional circumstances . . . is used infrequently and usually requires 'rare procedural anomalies.'" *Hill v. Estate of Allred*, 2009 UT 28, ¶ 25, 216 P.3d 929 (quoting *State v. Dunn*, 850 P.2d 1201, 1209 n. 3 (Utah 1993)).

ISSUE IV: Did the District Court correctly rule that Utah's privilege tax does not violate the Supremacy Clause by taxing the full value of property that is possessed and beneficially used for profit by ATK but owned by the U.S. Navy, where ATK's possession of the property was exclusive, its beneficial use of the property was the value of the property and there was no tax assessed against the Navy?

[Issue preserved: R. 1085-1087]

Standard of Review. Appellate courts review summary judgment determinations for correctness, granting no deference to the district court's legal conclusions; appellate courts determine only whether the district court erred in applying the governing law and whether it correctly held that there were no disputed issues of material fact. *Salt Lake County v. Holliday Water Co.*, --- P.3d ----, 2010 WL 2332985 Utah, 2010 (quoting *Hansen v. Am. Online, Inc.,* 2004 UT 62, ¶ 6, 96 P.3d 950 and *Kouris v. Utah Highway Patrol,* 2003 UT 19, ¶ 5, 70 P.3d 72).

DETERMINATIVE LAW

Utah Code Ann. § 59-4-101. Tax basis -- Exceptions -- Assessment and collection.

(1) (a) Except as provided in Subsections (1)(b) and (c), a tax is imposed on the possession or other beneficial use enjoyed by any person of any real or personal property which for any reason is exempt from taxation, if that property is used in connection with a business conducted for profit.

(2) The tax imposed under this chapter is the same amount that the ad valorem property tax would be if the possessor or user were the owner of the property. The amount of any payments which are made in lieu of taxes is credited against the tax imposed on the beneficial use of property owned by the federal government.

***

(3) A tax is not imposed under this chapter on the following:

***

(e) the use or possession of any lease, permit, or easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates. Every lessee, permittee, or other holder of a right to remove or extract the mineral covered by the holder's lease, right, permit, or easement except from brines of the Great Salt Lake, is considered to be in possession of the premises, notwithstanding the fact that other parties may have a similar right to remove or extract another mineral from the same lands or estates;

***

(4) A tax imposed under this chapter is assessed to the possessors or users of the property on the same forms, and collected and distributed at the same time and in the same manner, as taxes assessed owners, possessors, or other claimants of property which is subject to ad valorem property taxation. The tax is not a lien against the property, and no tax-exempt property may be attached, encumbered, sold, or otherwise affected for the collection of the tax.

STATEMENT OF THE CASE

A. Nature of Proceedings.

This is an appeal by ATK from a District Court Decision and Order granting summary judgment in favor of the County, the Utah State Tax Commission and Granite School District and upholding the County's privilege tax assessment against ATK for its beneficial use for profit of exempt property owned by the United States Navy. R. 1087, 1089-1090. Addendum A.

B. Course of Proceedings Below.

Pursuant to his statutory duties, the Salt Lake County Assessor issued property tax assessments to ATK for its ownership and use of real and personal property located in Salt Lake County for tax year 2000. R. 191-259. Addendum B. In addition to property tax, the Assessor assessed a privilege tax on ATK's possession and beneficial use of exempt property owned by the United States Navy known as the Navy Industrial Reserve

Ordnance Plant ("NIROP"). *Id.* ATK appealed the 2000 assessments to the Salt Lake County Board of Equalization ("Board") where the Board, and later the Utah State Tax Commission, sustained the assessments. *Id.* ATK appealed to the District Court and the matter was assigned to a Tax Judge. Over the course of time, the parties reached a settlement on all property tax valuation issues, but reserved the right to challenge the 2000 privilege tax assessment of ATK's possession and beneficial use of NIROP (the "NIROP Issue"). R. 119-128. Ultimately the NIROP Issue was transferred to the Honorable Jon M. Memmott, Second Judicial District Judge sitting as a Tax Judge for the Third Judicial District. R. 1079-1087.

The County, with the support of Granite School District, and the Utah State Tax Commission filed Motions for Summary Judgment citing interpretive Utah case law and urging the District Court to rule that ATK was subject to and not exempt from Utah's Privilege Tax on its possession and beneficial use of the NIROP property. R. 75-108. ATK filed a cross Motion for Summary Judgment claiming that it was exempt from the privilege tax because it did not maintain exclusive possession of the NIROP property in as much as the Navy maintained a presence on the property to inspect the work performed under its government contracts by ATK. R. 747-764. Additionally, ATK asserted that when the beneficial user of exempt property does not have full, unfettered use of property, a privilege tax on the full value of the exempt property is a tax on the federal government's retained interest in that property. *Id.* ATK then argued that such a tax on the government's property interest is a violation of the Supremacy Clause of the United States Constitution. *Id.*

C. Disposition by the District Court.

The District Court adopted the factual assertions of the parties contained in their respective memoranda and concluded there were no material facts in dispute. R. 1081. Applying Utah law to the undisputed facts, the District Court further concluded that "ATK was in exclusive possession of the NIROP property as of 1 January 2000, as contemplated in Utah Code Ann. § 59-4-l01(3)(e) through its permitted possession and use of the premises under its Facilities Use, Capital Maintenance and Production Contracts and subcontracts, even though the land-owner, the Navy, retained traditional levels of management and control in the NIROP Property. No one else other than the land owner (*i.e.*, the Navy), had any possession, use, management, or control of the NIROP Property during 2000." R. 1090.

As to ATK's Supremacy Clause argument, the District Court further ordered that the tax imposed under Utah Code Ann. § 59-4-101 does not violate the Supremacy Clause of the United States Constitution. *Id.* The Supremacy Clause of the United States Constitution creates rights for the federal government, not for private individuals. *Id.* Under *Shelledy v. Lore*, 836 P.2d 786 (Utah 1992), this Court established a three-part test to determine when a party may assert the constitutional rights of a third party: "First, the presence of some substantial relationship between the claimant and the third parties; second, the impossibility of the rightholders asserting their own constitutional rights; and third, the need to avoid a dilution of third parties' constitutional rights that would result were the assertion of *jus tertii* not permitted.' R. 1091. The Court found that ATK could not establish the second and third requirements under the *Shelledy* test and therefore did

not have standing to raise the Supremacy Clause claim. *Id.* The Court further ruled that even if ATK had standing to assert its Supremacy Clause argument, which it did not, the privilege tax assessed against ATK was constitutional. *Id.* ATK had "exclusive possession" of the NIROP Property. *Id.* Since ATK's possession was exclusive, its beneficial use of the NIROP Property was the value of the NIROP Property and no tax was assessed against the Navy. *Id.*

D. Statement of Facts.

1. ATK is a leading supplier of aerospace and defense products to the U.S. Government, America's Allies, and major prime contracts. The Aerospace Division accounts for 40 percent or $436 million of all Fiscal Year 2000 sales. R. 76, 1081.

2. ATK's primary financial goal is to create maximum shareholder value through profitable growth and the effective use of cash and other resources. R. 77, 1081.

3. ATK's U.S. Government business is performed under both cost-plus contracts and fixed-price contracts. Cost-plus contracts are either cost-plus-fixed-fee, cost-plus-incentive-fee, or cost-plus-award fee contracts. Fixed price contracts are either firm fixed-price, fixed-price incentive, or fixed-price-level-of-effort contracts. ATK obtains military contracts through either competitive bidding or sole-sourced procurement. R. 78, 1081.

4. ATK's aerospace division utilizes property located in Magna, Salt Lake County, Utah known as Bacchus Works. Bacchus Works consists of three plants: Plant One, Bacchus West, and NIROP. R. 79, 1081.

5. As of March 31, 2000, ATK occupied manufacturing assembly, warehouse, test, research, development and office properties in Magna, Utah having a total floor space of approximately 2,324,000 square feet. These properties were either owned, leased or occupied under facilities use contracts with the U.S. Government, including 518,000 square feet occupied rent-free under a facilities contract that requires ATK to pay for all utilities, services, and maintenance costs. R. 79, 1081.

6. For 2000, the parties agreed that the value of ATK's Bacchus Works property in Salt Lake County, including exempt NIROP property possessed or beneficially used by ATK, on which the privilege tax was assessed, was $238,032,387. R. 79-80, 1081.

7. NIROP property at ATK's Bacchus Works plant is comprised of six (6) parcels that constitute approximately 528.48 acres of land and 181 improvements owned by the U. S. Navy. Alliant uses 165 improvements at NIROP in connection with its business to fulfill and perform its government contracts. The uses and features of the structures within NIROP are similar to those of ATK's Plant One. R. 80, 1081.

8. Of the 181 improvements located at NIROP, 15 no longer contribute value, six contribute less than $1,000 value each, and 16 contribute less than $5,000 value each. Consequently 144 of the improvements contribute 99.7% of the value for NIROP. R. 80, 1081.

9. ATK utilizes NIROP to fulfill its contracts with Lockheed Martin and McDonnell Douglas. NIROP is used in the manufacture of rocket motors for the Navy's Fleet Ballistic Missile (FBM) programs and other programs such as the U.S. Army Space

& Missile Defense Command in relation to the STARS and the Delta GEM-40 for McDonnell Douglas (Boeing). The missile rocket motors produced at NIROP have included the Trident II (commonly called D-5); Trident 1 (commonly called C-4), the Poseidon (commonly called C-3), and Polaris (commonly called C-4). R. 80-81, 1081.

10. Under ATK's cost-plus contract with Lockheed Martin for the Titan IV ("Titan IV Contract"), ATK was required to "furnish all necessary supplies and services required to perform the efforts associated with the Final Assemble Capability for T-IV SRMU for FY 00," in accordance with various contract provisions for a Target Price of approximately $19 million, with a Target Cost of $17 million and a Target Profit of $2 million. The total contract value had an estimated price of $380,869,476, and included an Award Fee for ATK's performance of over $6.8 million with a Mission Success Launch Incentive of over $16 million. In the performance of this Contract, ATK was authorized "to use throughout the period of performance of this Contract, on a rent-free non-interference basis, any of the Government Property (Government Furnished Property, Government Furnished Flight Hardware, Government Furnished Facilities, Government Furnished Technical Data, Special Tooling, Special Test Equipment and [ATK] Acquired Property) provided under, or for which a right to use has been previously granted for" under specified prime contracts and subcontracts. Technical direction to ATK under this Contract could only be given by Lockheed Martin, who retained the right of inspection. ATK had a duty to manage the subcontract effectively and efficiently. R. 81-82, 1081.

11. Similar provisions are included under ATK's cost-plus contract with Lockheed Martin for the Trident II (D-5) ("Trident II Contract"). For example, the

contract called for a Target Price of nearly $61.8 million, including a Target Cost of over $56.4 million and a Target Fee to ATK of $5.4 million. The contract included provisions for use of government-owned facilities, special tooling and special test equipment and allowed source inspections by Lockheed Martin. R. 82, 1081.

12. ATK's contract with McDonnell Douglas Corporation relates to the production of Ground-Ignited Graphite Epoxy Motors (GEM) and production of Air-Ignited Motors Equipped with Lengthened Nozzles (GEM-LN) for the Delta II program ("GEM Contract"). This fixed price contract had a total value of $486 million. ATK was the exclusive supplier to Boeing. Cross utilization requests were required for NIROP facilities. Performance was predicated upon the utilization of Government owned production equipment and facilities on a rent-free, non-interference basis. R. 82, 1081.

13. ATK has employees who work routinely at NIROP in connection with its for-profit business. R. 82, 1081.

14. NIROP is identified separately from surrounding properties by a chain link fence that identifies the NIROP property, warns trespassers to keep out and excludes the public. Only authorized personnel are allowed access to NIROP. R. 83, 1081.

15. The Navy's administrative offices are in ATK's administration building at Plant One. When a guest enters ATK's facilities, such guests must sign in and receive a badge. ATK controls who enters its NIROP facility. Pursuant to the facilities use contract between ATK and the United States, there would be no reason for the Navy to block access to ATK personnel to NIROP. R. 83, 1081.

16. The Navy Strategic Systems Program maintains an office at ATK's Plant One for the purpose of providing technical assistance under Navy supply and facilities contracts. R. 83, 1081.

17. ATK's possession and beneficial use of NIROP is pursuant to a "Facilities Use Contract" ("Contract") with the Navy's Strategic Systems Programs ("SSP"). ATK is granted access to, and use of, NIROP to fulfill contracts and subcontracts that ATK has with the Navy. ATK agrees to "use, maintain, account for, and dispose of [NIROP facilities] in accordance with the terms and conditions of this facilities use contract." ATK's Facilities Use Contract is exclusive, *i.e.*, no other business has a facilities use contract with the U.S. Government that grants access to and use of NIROP. R. 83, 1081.

18. ATK must give first priority of use of NIROP to work on behalf of SSP programs. Cross-utilization requests are common. R. 84, 1081.

19. ATK and not the Government is to provide all maintenance, repair, rehabilitation, or replacement of the several facilities accountable under the Facilities Use Contract. To that end, ATK entered into a Capital Maintenance Contract with the U.S. Government for the NIROP facilities. The estimated cost of maintenance under this contract to ATK for 2000 was $1,090,000. ATK, however, received no fee under this maintenance contract. The work called for by the Capital Maintenance Contract pertains to capital maintenance of NIROP facilities, "which are required by ATK to perform essential work on the Trident missile program." R. 84, 1081.

20. The Facilities Use Contract, initially signed in 1996, was to continue for a period of approximately 5 years. This Contract and all other contracts referenced herein,

including contracts with Lockheed Martin and McDonnell Douglas Corporation, incorporate Federal Acquisition Regulation Clauses ("FAR Clauses") and DOD FAR Supplement Clauses by reference together with other miscellaneous provisions. R.84, 1081.

21. Under FAR 52.245-9(b), "The Contractor may use the Government property without charge in the performance of – (1) Contracts with the Government that specifically authorize such use without charge; (2) Subcontracts of any tier under Government prime contracts if the Contracting Officer having cognizance of the prime contract – (i) Approves a subcontract specifically authorizing such use; or (ii) Otherwise authorizes such use in writing; and (3) Other work, if the Contracting Officer specifically authorizes in writing use without charge for such work." R. 84-85, 1081.

23. The unauthorized use of Government property can subject a person to fines, imprisonment, or both, under 18 U.S.C. 641. R. 85, 1081.

24. ATK's use of NIROP is further qualified by FAR Subpart 45.1 which prescribes policies and procedures for providing Government property to contractors, contractors' management and use of Government property, and reporting, redistributing, and disposing of contractor inventory. With four exceptions that do not apply herein, it does not apply to property under any statutory leasing authority. R. 85, 1081.

25. During late 1996 and early 1997, the Navy requested that the Facilities Use Contract be amended to have all buildings on NIROP which contain high energy propellant (D5) sited using a 1.25 TNT equivalency. Effective March of 1997, ATK agreed to site the NIROP facilities to the 1.25 TNT equivalence criteria to process

Trident propellant. Explosive limits were reduced thus impacting the rest houses (magazines). Siting the facilities to a TNT equivalence was unique to and necessary for ATK's business operations and use of the NIROP facilities. R. 85, 1081.

SUMMARY OF ARGUMENTS

ATK challenges the County's privilege tax assessment on its possession and beneficial use for profit of tax-exempt property owned by the United States Navy ("NIROP").[1] The District Court rejected all claims by ATK.

First, ATK claims it is exempt under section 59-4-101(3)(e) because it does not have "exclusive possession" of NIROP since, it argues, the Navy retains "possession and control" over the property. However, ATK both misstates its relationship with NIROP and the Navy and it misinterprets section 59-4-101(3)(e).

ATK is an independent contractor that holds an exclusive Facilities Use Contract with the government. It is permitted to use the Navy property practically as it chooses on a rent-free non-interference basis and no other private company is authorized to use the Navy property for any purpose. Under its Facilities Use Contract, ATK agrees to use, maintain, account for, and dispose of the facilities as specified in the Agreement.

ATK misinterprets section 59-4-101(3)(e) which, under the plain language of the statute and interpretive case law, only applies to third parties and not to the exempt property owner, *i.e.,* the Navy. ATK's reliance on *Keller v. Southwood North Medical Pavilion, Inc.* is misplaced. *Keller* construed Utah's forcible retainer statute, not Utah's

[1] ATK is a leading commercial supplier of aerospace and defense products to the U.S. Government, America's Allies, and major prime contracts.

Privilege Tax Act – two contrasting statutes. Moreover, ATK's business relationship with the Navy is by *permit*, not by lease as discussed in *Keller*. Attempting to apply *Keller* to this appeal leads to a meaningless and inoperable interpretation of section 59-4-101(3)(e) apparently conceded by ATK. ATK's flawed interpretation of section 59-4-101(3)(e) violates the well-establish principle that tax exemptions are to be strictly construed and all ambiguities are to be resolved in favor of taxation. ATK bears the burden of establishing an exemption from Utah's privilege tax.

The County asserts that the Utah Supreme Court rulings in *Thiokol Chemical Corporation* is determinative. This Court should find that ATK is subject to the privilege tax.

Second, ATK claims that the privilege tax assessment is unconstitutional and violates the Supremacy Clause. However, under the Utah Supreme Court's ruling in *Shelledy*, ATK, which is not an agency or instrumentality of the United States Government, does not have standing to bring a Supremacy Clause challenge. Failing under the *Shelledy* test, ATK raises for the first time on appeal an issue and argument that it has suffered an economic impact that entitles it to standing to assert that the privilege tax violates the Supremacy Clause under the Doctrine of Pre-emption. Issues and argument raised for the first time on appeal may not be considered.

Finally, even if the Court were to consider ATK's standing argument, which it should not, the County's privilege tax assessment does not violate of the Supremacy Clause of the United States' Constitution because the United States Supreme Court and Utah's Supreme Court have previously upheld the assessment of a tax based on the

possession and beneficial use by an independent contractor of federally owned property. This Court should reject ATK's challenges and affirm the ruling of the District Court.

ARGUMENT

I. ATK IS SUBJECT TO UTAH'S PRIVILEGE TAX FOR ITS POSSESSION AND BENEFICIAL USE OF THE NIROP PROPERTY – EXEMPT GOVERNMENT PROPERTY USED IN CONNECTION WITH ITS BUSINESS CONDUCTED FOR PROFIT.

The Honorable Jon M. Memmott, Tax Judge sitting for the Third District Court, ruled that ATK was subject to Utah's privilege tax since "ATK was in exclusive possession of the NIROP property as of 1 January 2000, as contemplated in Utah Code Ann. § 59-4-101(3)(e) through its permitted possession and use of the premises under its Facilities Use, Capital Maintenance and Production Contracts and subcontracts, even though the land-owner, the Navy, retained traditional levels of management and control in the NIROP Property. No one else other than the land owner (*i.e.*, the Navy), had any possession, use, management, or control of the NIROP Property during 2000."[2] The District Court's ruling is consistent with the plain language of the privilege tax statute. Moreover it is supported by interpretive Utah case law, including *Thiokol Chemical Corporation v. Peterson*, 393 P.2d 391 (Utah 1964); *ABCO Enterprises v. Utah State Tax Commission*, 211 P.3d 382 (Utah 2009); and *Interwest Aviation v. County Board of Equalization of Salt Lake County,* 743 P.2d 1222 (Utah 1987). This Court should affirm the District Court's ruling.

A. The Privilege Tax closes any gaps in the Tax Laws.

Utah's Privilege Tax Act was enacted in 1959 to close any gaps in the tax laws by imposing a tax on any property possessed or used in connection with a business for profit

[2] R. 1090

which was otherwise exempt from taxation.[3] It closely resembles the Michigan statute of similar purpose, which was held constitutional in a series of U. S. Supreme Court cases.[4] These cases are grounded on the proposition that a private contractor's right to use property in a business conducted for profit may be made subject to a nondiscriminatory tax based on its value, even though title to the property may be in the United States; and that the burden of the tax may ultimately fall on it.[5] Overlapping taxation does not occur when government-owned property is held and used by private person for private use and profit; in such situation, property is used as if it were private property, and the policy favoring taxation exists.[6]

The Utah Supreme Court recently reaffirmed the constitutionality and application of Utah's Privilege Tax Statute. In *ABCO Enterprises v. Utah State Tax Commission,* ABCO Enterprises (ABCO) occupied and used for several years two parcels of property owned by Ogden City. Because of Ogden City's ownership, the properties were exempt from property tax under the Utah Constitution.[7] The Weber County Board of Equalization assessed a privilege tax to ABCO pursuant to Utah's Privilege Tax Act.[8] Because ABCO used the properties to conduct a for-profit business it was required to pay

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[3] *Thiokol Chemical Corporation v. Peterson*, 393 P.2d 391 at 393 (Utah 1964).
[4] *Id.* at 394. *See, United States v. City of Detroit*, 355 U.S. 466 (1958); *United States v. Township of Muskegon*, 355 U.S. 484 (1958); *City of Detroit v. Murray Corp. of America*, 355 U.S. 489 (1958). *See Note*, The Supreme Court, 1957 Term, 72 Harv.Law Rev. 77, 157-161 (1958).
[5] *Id.*
[6] *Interwest Aviation v. County Board of Equalization of Salt Lake County,* 743 P.2d 1222 at 1225 (Utah 1987).
[7] *ABCO Enterprises v. Utah State Tax Commission*, 211 P.3d 382 at 384 (2009).
[8] Utah Code Ann. § 59-4-101 et seq.

a privilege tax in the same amount as the property taxes that would have been owed by an owner of nonexempt property. Weber County's Board of Equalization and the Utah State Tax Commission both ruled that the Weber County Assessor properly assessed the privilege tax.[9]

ABCO challenged the assessment claiming that assessing a privilege tax on a leasehold interest at the same amount that a fee simple interest would be assessed, violated the uniform operation of laws provision of article I, section 24 of the Utah Constitution or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[10] Justice Durham writing for the Court however ruled "[t]he privilege tax . . . does not violate the uniform operation of laws provision of the Utah Constitution or the Equal Protection Clause."[11] In its three-pronged analysis, the Supreme Court declared first, that the classification created by the privilege tax was reasonable, and where ABCO voluntarily joined the classification, the privilege tax created no competitive disadvantage, and equalized the tax burden.[12] Second, that the legislative purpose of the privilege tax was legitimate in that it closed any gaps in the tax law; and third, that the classification was rationally related to its legitimate purpose where no unreasonable burden existed and the privilege tax effectively closed any gaps through equalized revenue generation.[13]

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[9] 211 P.3d at 384.
[10] *Id.*
[11] *Id.* at 390.
[12] *Id.*
[13] *Id.*

B. ATK's possession and beneficial use of the NIROP Property meets the statutory threshold for application of privilege tax under Utah Code Ann. § 59-4-101(1)(a).

In *Interwest Aviation v. County Board of Equalization of Salt Lake County,*[14] the Utah Supreme Court established a pattern of analysis for applying Utah's Privilege tax statute stating "[t]o fall within the ambit of the exemption provided by § 59-13-73,[15] three statutory criteria must be satisfied. First, the property in question must be of the type that ordinarily is exempt from taxation. Second, the property must be used by a private individual, association, or corporation in connection with a for-profit business. Third, the business entity must be a concessionaire at one of the listed public facilities." The first two criteria establish prima facie application of the privilege tax. The third criteria examines whether an exemption applies. In *Interwest*, the Supreme Court's third analysis reviewed the unrelated concessionaire's exemption.[16] Here, the County will address ATK's "exclusive use" exemption claim under Utah Code Ann. § 59-4-101(3)(e).

In applying the *Interwest* analysis, ATK is clearly subject to the statutory threshold for application of the privilege tax. First, there is no dispute that NIROP consists of real property and improvements owned by the federal government. Federally owned property is exempt under Utah law and thus the NIROP property is exempt.[17]

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[14] 743 P.2d 1222 (Utah 1987).
[15] Utah Code Ann. § 59-13-73 was the forerunner to Utah Code Ann. § 59-4-101 et seq.
[16] *Id.*
[17] Utah Code Ann. §59-2-1101(3)(a). *See also, Thiokol Chemical Corporation v. Peterson*, 393 P.2d 391 at 393 (Utah 1964) (the state cannot impose a tax upon the United States or its agencies, citing *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819)).

Second, the property is used by a private corporation in connection with a for-profit business. There is also no dispute that ATK is a for-profit corporation manufacturing rocket motors for prime contractors with government contracts.[18] ATK's stated primary financial goal is to create maximum shareholder value through profitable growth and the effective use of cash and other resources.[19] ATK's business includes work under the Titan IV cost-plus Contract with prime contractor Lockheed Martin, the Trident II (D-5) cost-plus contract, and the fixed price contract for the production of GEM and GEM-LN for the Delta II program pursuant subcontracts with prime contractor McDonnell Douglas (Boeing).[20] Between these first two criteria, ATK's use of NIROP pursuant to its Facilities Use and Capital Maintenance Contracts to perform its business operations under the Titan IV, Trident II and GEM Contracts result in ATK's possession and beneficial use of exempt property. Consequently all elements for imposing the privilege tax are met.

Under nearly identical facts, the Utah Supreme Court in *Thiokol Chemical Corporation v. Peterson* ruled that plaintiff Thiokol Chemical Corporation at its Wasatch Division plant in Box Elder County was subject to the privilege tax for its research and development of the first stage of the Minute Man Missile under a cost-plus contract with

[18] Statement of Facts, ¶¶ 1-3, 9-12.
[19] *Id.* ¶ 2.
[20] *Id.* ¶ 9-12.

the United States.[21] The *Thiokol* Court sustained Box Elder County's 1961 privilege tax assessment on property which the contract recited title remained in the United States.[22]

Additionally, ATK's use of NIROP as meeting the threshold application for privilege tax is consistent with the Parties Settlement Agreement. The Parties agreed that the sole issue before this Court would be whether NIROP was exempt from the privilege tax under Utah law.[23] This Court should begin its analysis from the conclusion that ATK's profitable possession and beneficial use of NIROP meets the threshold application of the privilege tax.

C. ATK misstates its relationship with the Government in its use of NIROP

ATK tries to recast the government's relationship in such a way that it would appear the government controls ATK operations at NIROP.[24] Such characterization is wholly inconsistent with the written contracts that define their relationship.

Under express terms of the Facilities Use Contract:

> The parties hereto agree that the terms and conditions of this facilities use contract shall apply to those facilities provided to the Contractor by the Government (Strategic Systems Programs, Department of the Navy) *for the Contractor's use in performance of contracts or subcontracts, or both, for the Fleet Ballistic Missile (FBM) System. The Contractor agrees to use, maintain, account for, and dispose of the such facilities in accordance with the terms and conditions of the facilities use contract.*[25]

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[21] *Thiokol Chemical Corporation v. Peterson*, 393 P.2d 391 at 393 (Utah 1964).
[22] *Id.* at 395.
[23] R. 127.
[24] ATK Opening Brief p. 10, ¶¶ 16-18 and p. 28.
[25] R. 647; Addendum C.

Thus, the government and ATK both agree that the NIROP facilities are provided to ATK by the government, and that ATK – not the government – will use, maintain, account for, and dispose of the NIROP facilities. ATK is an independent contractor and not an agent of the government.[26] Under the contract caption "Cognizant Contract Programmatic and Technical Authority (Feb 1993)," the SSP is designated as the "on-site representative of the Director, Strategic Systems Programs (DIRSSP) with delegated authorities *on programmatic and technical requirements* on the FBMWS/SWS."[27] In other words, the SSP serves as an inspector or observer providing guidance for programmatic and technical requirements for the FBM.[28] The Government provides no maintenance, repair, rehabilitation or replacement of the severable facilities accountable under the contract.[29] ATK provides the capital maintenance of the facilities required by ATK to perform essential work on the Trident missile.[30] Under ATK's Titan IV contract with Lockheed Martin, ATK is authorized to use its Government Property on a *rent-free non-interference basis.*[31] Similarly, performance under ATK's GEM Contract with McDonnell Douglas Corporation is predicated upon the utilization of Government owned production equipment and facilities on a *rent-free, non-interference basis.*[32]

As a practical matter, it seems counter intuitive that the government would direct and control ATK operations at NIROP. As a publicly traded corporation, ATK is the

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[26] *Id.*
[27] R. 648.
[28] *Id.*
[29] R. 650.
[30] R. 825.
[31] Statement of Facts, ¶ 10.
[32] *Id.* at ¶ 12.

leading supplier of aerospace and defense products to the U.S. Government and a global leader in the development and production of large solid propulsion rocket motors for space and strategic applications and a provider of space launch services.[33] ATK's Aerospace segment designs, develops, and manufactures solid rocket propulsion systems for space and strategic applications and composite structures for military and commercial aircraft, space launch vehicles, government and commercial satellites, and spacecraft.[34] ATK has the expertise. ATK has the experience. ATK has the manpower. ATK holds the contracts to build rocket motors. ATK owns the primary manufacturing facilities for the Trident rocket motor production. ATK uses NIROP in a support role to its privately owned property.

The relationship between ATK and the SSP is virtually identical to that between Thiokol Chemical Corporation and the Government in *Thiokol Chemical Corporation v. Peterson.*[35] In *Thiokol,* Plaintiff Thiokol Chemical Corporation ("Thiokol") had since 1957 been engaged in the research and development of the first stage of the Minute Man Missile under a cost-plus contract with the United States.[36] Thiokol was an independent contractor and not an agent of the U.S. Government because it could deal with the property "practically as it chooses" pursuant to its cost-plus contract.

> It ha[d] the right to inspect and reject any property found unsuitable to its uses. Upon acceptance it has the duty to maintain, but no liability for loss, damage or the using it up entirely. Thiokol is given the right to possession

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[33] *Id.* at ¶ 1.
[34] R. 76.
[35] *Thiokol Chemical Corporation v. Peterson,* 393 P.2d 391 (Utah 1964).
[36] Thiokol Chemical Corporation was purchased by ATK and is now ATK Thiokol, Inc.

> and to use it primarily in conjunction with the contract. This seems to imply that it could use the property for other purposes if it so desires.[37]

Moreover, the Utah Supreme Court in *Thiokol* stated:

> The above conclusion [that the contract specified the end result and not the means to the end result] is not changed by the fact that under the contract the Government maintains a staff of about 60 people to supervise such things as security, safety measures, labor relations, accounting, procurement and the Company's organizational structure, including wages and salaries. These measures are quite understandable because of the desirability of safeguarding the interests of the Government in the expenditure of such large sums of Government money; and more importantly, because of the necessity for maximum security in this field vital to the national defense. But they are not inconsistent with the main purport of the contract which is directed toward requiring Thiokol to pursue its own course in accomplishing 'the end result,' rather than the Government having actual management and direction of the enterprise[38]

So it is with ATK and the SSP. The Government maintains a small staff authorized only to administer the programmatic and technical requirements of the Fleet Ballistic Missile (FBM). ATK is under contract to manufacture rocket motors. The Court should rule that ATK is subject to Utah's privilege tax for its beneficial use and possession of NIROP.

D. ATK's possession and beneficial use of the NIROP Property is not exempt from privilege tax under Utah Code Ann. § 59-4-101(3)(e).

Exemptions from taxation are to be strictly construed and all ambiguities are to be resolved in favor of taxation.[39] The burden of establishing the exemption lies

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[37] *Thiokol Chemical Corporation v. Peterson,* 393 P.2d 391, 394 (Utah 1964).
[38] *Id.*
[39] *Great Salt Lake Minerals & Chemicals Corp. v. State Tax Commission,* 573 P.2d 337 (Utah 1977) citing *State v. Salt Lake County,* 96 Utah 464, 85 P.2d 851 (1938), citing *State ex rel. Richards v. Armstrong,* 17 Utah 166, 53 P. 981 (1898) and *Judge v. Spencer,* 15 Utah 242, 48 P. 1097 (1897). Note that the rule should not be so narrowly applied as to defeat its purpose. *Corporation of Episcopal Church in Utah v. Utah State Tax Com'n,* 919 P.2d 556 (Utah 1996).

with the entity claiming it.[40] That burden here lies with ATK.

1. ATK has misconstrued and misapplied Utah Code Ann. § 59-4-101(3)(e)

In its opening brief, ATK invokes the provisions of Utah Code Ann. § 59-4-101(3)(e) and asserts that the District Court erred in finding that ATK had "exclusive possession" of the NIROP properties. ATK argues that the plain language of this privilege tax statute only permits the assessment of a privilege tax when the user of the exempt property has "exclusive possession" of that property.[41] ATK suggests that so long as the *owner* retains some degree of control of that property, the user does not have "exclusive possession" and, therefore, is not subject to the privilege tax.[42]

The District Court rejected ATK's analysis and concluded that ATK did have exclusive possession of the NIROP Property pursuant to its Facilities Use Contract or permit to use the NIROP Property.[43] In reaching this conclusion, the District Court applied well-established principles of statutory construction and determined that the Court was to strictly construe the exemption statute and resolve all ambiguities in favor of taxation. The Court further determined to "read the words of a statute literally unless

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[40] *Great Salt Lake Minerals & Chemicals Corp. v. State Tax Commission*, 573 P.2d 337 (Utah 1977) although that burden must not be permitted to frustrate the exemption's objectives.
[41] ATK Opening Brief p. 13.
[42] *Id.* at 18, 28.
[43] R 1090.

such a reading is unreasonably confused or inoperable . . . [and] presume that the statute is valid and that the words and phrases used were chosen carefully and advisedly.[44]

ATK cites *Keller v. Southwood North Medical Plaza, Inc.,*[45] to argue that it did not have exclusive control because the Navy retained some amount of management and control of the NIROP Property. Rejecting ATK's reliance on *Keller,* the District Court concluded

> While this interpretation may be appropriate for forcible entry actions, such as in *Keller*, this interpretation would render the language of Utah Code Ann. § 59-4-101 non-sensical. By their very definition and operation, a lease, a permit, and an easement transfer less than the full bundle of rights held by the landowner. Additionally, the language of the statute contemplates that a person may have exclusive possession under a lease, a permit, or an easement. See Utah Code Ann. § 59-4-101(3)(e). If, as ATK argues, the statute's use of exclusive possession excepted the retention of management and control by the landowner (*i.e.* the Navy), the privilege tax could only be assessed against a landowner in fee-simple. Such a reading is "unreasonably confused and inoperable," because the landowner in fee simple, the Navy, is exempt from property taxes under Utah Code Ann. § 59-2-1101(3)(a). *Gull Labs., Inc.,* 936 P.2d at 1084 (quotations omitted).
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> Moreover, in this matter, much of the management and control exercised by the Navy on the NIROP Property was ancillary to ATK' s operations and, therefore, beneficial to ATK. *Cf.Loyal Order of Moose v. County Bd. of Equalization of Salt Lake County*, 657 P.2d 257, 261-63 (Utah 1982). For example, the Navy used their office at ATK's administration building in Plant One to provide technical assistance to ATK in their fulfillment of Navy contracts. Additionally, the fourteen (14) Navy personnel were on site to manage the NIROP Property and assist ATK in the fulfillment of Navy contracts.

ATK's criticism of the District Court ruling and its reliance on *Keller* are misplaced.

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[44] *Gull Labs., Inc. v. Utah State Tax Comm'n,* 936 P.2d 1082, 1084 (Utah Ct. App. 1997).
[45] 959 P.2d 102, 107 (Utah 1998).

2. *Keller* was an unlawful detainer decision that provides little guidance and no analytical authority on the interpretation of Utah's Privilege Tax Act.

In *Keller v. Southwood North Medical Pavilion, Inc.*,[46] Lessee Dr. Clyde B. Keller brought an action against Lessor Southwood North Medical Pavilion, Inc. and Dr. Robert L. Youngblood (collectively "Youngblood") for trespass, conversion, and interference with prospective business advantage, after Youngblood removed two signs owned by Keller from a business monument. Under the terms of his lease originally negotiated with a former lessor, Keller could place a sign on this monument to advertise his services. However the sign had to be in keeping with other signs as to size and location. Because Keller wanted a larger sign he renegotiated his lease. Youngblood, successor in interest to the original lessor, later told Keller his signs were "unprofessional" and that they should be removed. Keller did not remove the signs. Several months followed and Youngblood later removed the two signs without permission or notice to Keller. Keller relocated his practice and then sued.

The lower court found Youngblood's removal of the signs violated the forcible entry statute and awarded Keller treble damages under the statute. Youngblood appealed claiming, among other things, that Keller's access to signage space did not constitute "real property" within the meaning of the forcible entry statute.

Writing for the Supreme Court and in the context of Utah's forcible entry statute, Justice Zimmerman noted that a lease "conveys an interest in land and transfers

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[46] 949 P.2d 102 (Utah 1998).

possession.[47] It must convey a definite space and must transfer exclusive possession of that space to the lessee.[48] In contrast, a license in real property 'is the permission or authority to engage in a particular act or series of acts upon the land of another without possessing an interest therein.'"[49] The Supreme Court concluded that Keller's lease agreement gave him a license, not a leasehold interest in the business monument, since Keller, like all other tenants, had permission to place a sign on the monument. Keller's lease did not transfer possession of any part of the monument to him, nor did it assign any definite space to him or give him exclusive possession of any space on the monument.[50] Further, Youngblood retained management and control of the monument.[51]

The *Keller* decision provides little guidance on the application of a privilege tax to ATK for its possession and beneficial use of the NIROP Property pursuant to its Facilities Use Contract for multiple reasons noted below. And as the District Court correctly noted, ATK's interpretation and application of *Keller* to Utah Code Ann. § 59-4-101 will render the statute non-sensical, *i.e.,* absurd or unreasonably confused or inoperable.[52]

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[47] *Id. See also* 49 Am. Jur.2d *Landlord and Tenant* § 21 (1995).
[48] *See id.*
[49] 959 P.2d 102, 107 (Utah 1998).
[50] *Id.*
[51] *Id.*
[52] *Rowsell v. Labor Com'n,* 186 P.3d 968 Utah App.,2008 ("[a]n equally well-settled caveat to the plain meaning rule states that a court should not follow the literal language of a statute if its plain meaning works an absurd result" quoting *Savage v. Utah Youth Vill.,* 2004 UT 102, ¶ 18, 104 P.3d 1242). *See also, Carlie v. Morgan,* 922 P.2d 1, 4 (Utah 1996) ('each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable, quoting *Savage Indus., Inc. v. Utah State Tax Comm'n,* 811 P.2d 664, 670 (Utah 1991)).

First, the forcible retainer statute and Utah's Privilege Tax Act are contrasting statutes with absolutely no comparable analysis in creation, interpretation or application.

Second, ATK's business relationship with the United States Navy as argued by ATK and as determined by the District Court is by *permit*, not by lease.[53] ATK operates NIROP pursuant to an exclusive Facilities Use Contract which all parties admit is neither a lease nor an easement. Consequently, any "exclusive possession" analysis under *Keller* which pertains to a leasehold relationship, necessarily and admittedly, has no application here.

Third, section 59-4-101(3)(e) clearly contemplates that "exclusive possession" may apply across the board to any business relationship based on *lease, permit* or *easement.*[54] In other words, if one could never obtain "exclusive possession" of real property by *permit*, then reference by section 59-4-101(3)(e) to permits is meaningless and inoperable in violation of the principle of statutory construction that each word is used advisedly and effect should be given to each term according to its ordinary meaning.[55] ATK concedes this inoperable reading of section 59-4-101(3)(e) when it boldly states "ATK relied on Keller to demonstrate that a lessee can have 'exclusive

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[53] R. 1083.

[54] Section 59-4-101(3)(e) states that a privilege tax is not imposed on "the use or possession of any lease, permit, or easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates."

[55] *State v. Low*, 192 P.3d 867 (Utah 2008) (Under rules of statutory construction, the Court looks first to the statute's plain language to determine its meaning and presumes that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning).

possession' of property, but a permittee cannot."[56] Moreover, ATK's argument under *Keller* – that management and control by the exempt property owner eviscerate exclusivity – suggests that one could never have "exclusive possession" in a license or permit since a licensor or permittor will always maintain some management and control of the premises to which the license or permit applies.

3. Exclusive possession under § 59-4-101(3)(e) refers to exclusive possession as to *third parties* and not as to the exempt property owner.

The County asserts that "exclusive possession" under section 59-4-101(3)(e) refers to *third party* exclusivity or exclusive possession as to *third parties* and not as to the exempt property owner. In every application of the privilege tax, the fee owner of the exempt property necessarily retains several key rights in its total "bundle of rights"[57] and thus will always retain some quantum of control or management over the property, as for example the right of a landlord to re-enter and inspect his improvements in a landlord – tenant relationship, or the right of the government to issue multiple permits over grazing or mineral extraction on public lands. This point is highlighted in *ABCO Enterprises v. Utah State Tax Commission* which contrasted the leasehold interest of ABCO with the fee simple interests of the exempt property owner, Ogden City, thus recognizing the retained rights of an

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[56] ATK Opening Brief, p. 23.

[57] *See,* The Appraisal of Real Estate, Twelfth Edition, pp. 68-69 ("[t]he bundle of rights concept compares real property ownership to a bundle of sticks. Each stick in the bundle represents a separate right or interest inherent in the ownership... The complete bundle includes the following: The right to sell an interest; The right to lease an interest and to occupy the property; The right to mortgage an interest; The right to give an interest away; and The right to do none or all of these things").

exempt property owner over the lesser rights of its lessee. ABCO challenged Weber County's privilege tax assessment by asserting that a privilege tax on a leasehold interest – the interest held by ABCO – at the same amount as a fee simple interest – the interest held by Ogden City – violated equal protection under federal law and the uniform operation of law provision under article I, section 24 of the Utah Constitution. Indeed, ABCO's rights in Ogden City's property were but a fraction of the rights held by Ogden City in fee simple interest. A fee simple interest gave Ogden City rights to the property that ABCO as lessee did not have. Even so, ABCO's argument was rejected and the privilege tax sustained. The exclusive use exemption provision of section 59-4-101(3)(e) cannot include the exempt property owner without eviscerating the statute.

This interpretation is further consistent with the plain clarifying language of the second sentence in section 59-4-101(3)(e), enacted in 1975, which provides that "[e]very lessee, permittee, or other holder of a right to remove or extract the mineral covered by the holder's lease, right, permit, or easement except from brines of the Great Salt Lake, is considered to be in possession of the premises, *notwithstanding the fact that other parties may have a similar right* to remove or extract another mineral from the same lands or estates."[58] This legislative reference to "other

[58] Emphasis added. In 1975, the Utah Legislature clarified and narrowed the *exclusive possession* exemption by adding this second sentence that specifically addressed the exemption for lessees, permittees, or other holders of a right to remove or extract minerals-except from brines of the Great Salt Lake. For a further discussion on the legislative history of Utah's Privilege Tax Act, see R. 969-972.

parties" clarifies that "exclusive possession" applies to *third parties* and not to the exempt property owner, in this case, the Navy.[59]

Utah case law also supports the County's argument of *third party* exclusivity. In the 1920 Utah Supreme Court decision *Boley et al. v. Butterfield,*[60] the high court considered whether an instrument upon which the action was brought conferred upon defendant an exclusive right to graze his sheep upon the land during the season covered by the lease.[61] The court analyzed the issue by reviewing the controlling words of the instrument and concluded the *lease* was simply a *permit* to graze certain sheep upon the land. Then the court stated:

> As to whether or not the permit granted was exclusive or nonexclusive, the instrument is ambiguous. It is not self-explanatory, especially in view of the fact that different bands of sheep belonging to different owners may graze within the same territorial limits. The court cannot say as a matter of law that a grazing permit of certain lands means an exclusive permit. It clearly may mean a right in common with others, or it may mean an exclusive right, according to the conditions existing at the time and the circumstances attending the granting of the permit.

When the legislature first enacted the Privilege Tax Act in 1959, this 1920 Supreme Court opinion formed part of the legal landscape considered by the legislature. Under

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[59] *Duke v. Graham*, 158 P.3d 540 Utah, 2007 ("[T]he plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and with other statutes under the same and related chapters" *State v. Schofield*, 2002 UT 132, ¶ 8, 63 P.3d 667).
[60] *Boley et al. v. Butterfield*, 194 P. 128 (Utah 1920).
[61] 194 P. at 130.

Boley, whether a permit was exclusive was determined relative to *third party users* and not the exempt property owner.[62]

4. Exclusive possession as to third parties narrowly and strictly construes § 59-4-101(3)(e) giving meaning to each term and phrase.

The County and ATK both agree that exemptions from taxation are to be strictly construed and all ambiguities are to be resolved in favor of taxation.[63] Yet ATK is critical that the County and the District Court fail to accept what really constitutes an expanded (and unworkable) interpretation by ATK of section 59-4-101(3)(e) to include the exclusive possession from the exempt property owner. The County asserts that the "exclusive possession" clause is determined relative to *third party users* and not the exempt property owner. By arguing that "exclusive possession" is to be viewed relative to and include the exempt property owner, ATK has expanded the scope of section 59-4-101(3)(e) and in so doing has violated the well established tenet of Utah law that exemptions are to be narrowly and strictly construed.[64]

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[62] ATK's assertion that the phrase "exclusive possession" cannot be equated with "shared possession" begs the question of whether "exclusive possession" in section 59-4-101(3)(e) refers to third parties or the exempt property owner.

[63] ATK Opening Brief p. 5. *See also*, fn. 39 herein.

[64] In other words, ATK does what it accuses the County and District Court of doing – broadly construing an exemption statute. *See,* ATK Opening Brief, p. 16 and Section I. C., pp. 26-28.

E. The Utah Supreme Court's rulings in *Thiokol Chemical Corporation* is determinative.

The factual background and relationship between ATK and the Government is virtually identical to that between Thiokol Chemical Corporation and the Government in *Thiokol Chemical Corporation v. Peterson.*[65]

In *Thiokol,* Plaintiff Thiokol Chemical Corporation ("Thiokol") engaged in the research and development of the first stage of the Minute Man Missile under a cost-plus contract with the United States. Thiokol was an independent contractor and not an agent of the U.S. Government. It could deal with the property "practically as it chooses" pursuant to its cost-plus contract. The Supreme Court stated

> It ha[d] the right to inspect and reject any property found unsuitable to its uses. Upon acceptance it has the duty to maintain, but no liability for loss, damage or the using it up entirely. Thiokol is given the right to possession and to use it primarily in conjunction with the contract. This seems to imply that it could use the property for other purposes if it so desires.[66]

Under the facts of this appeal, ATK is engaged in the manufacture and production of rocket motors under cost-plus contracts with the Prime Contractors, *e.g.,* Lockheed Martin and McDonnell Douglas – cost-plus contracts that authorize ATK to use Government Property on a *rent-free non-interference basis.*[67] ATK is an independent contractor and not an agent of the U.S. Government. By contract, ATK is given to "use, maintain, account for, and dispose of [NIROP facilities] in accordance with the terms and conditions of this facilities use contract." Consequently, ATK is subject to Utah's

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[65] *Thiokol Chemical Corporation v. Peterson,* 393 P.2d 391 (Utah 1964). Thiokol Chemical Corporation was purchased by ATK and is now ATK Thiokol, Inc.
[66] 393 P.2d 391, 394 (Utah 1964).
[67] Statement of Facts, ¶ 10, 12.

privilege tax as a for-profit business on its beneficial use and possession of NIROP and is not exempt under section 59-4-101(3)(e). This Court should affirm the District Court ruling.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT ATK DID NOT HAVE STANDING TO RAISE THE SUPREMACY CLAUSE CHALLENGE BASED ON FEDERAL GOVERNMENT IMMUNITY FROM TAXATION.

ATK argues that an assessment on the full value of the property taxes the U.S. Government's "retained interest" in the property and therefore violates the Supremacy Clause of the U.S. Constitution.[68] The District Court correctly determined, pursuant to this Court's decision in *Shelledy v. Lore*, 836 P.2d 786 (Utah 1992), that ATK did not have standing to challenge the constitutionality of the privilege tax under the Supremacy Clause because it is asserting the constitutional rights of a third party.

A. ATK failed to preserve the issue and argument that it was economically impacted and thus had standing in its own right to assert a violation of the Supremacy Clause under the Doctrine of Pre-emption.

ATK doesn't challenge the underlying correctness of *Shelledy*. However, for the first time on appeal, it contends that it can challenge the constitutionality of the statute because it has standing in its own right because it has suffered "economic impact."[69] Also for the first time on appeal, it contends that by asserting the Doctrine of Pre-emption under the Supremacy Clause it has standing to challenge the constitutionality of Utah's

[68] ATK Opening Brief at 28-29.
[69] ATK Opening Brief at 30.

privilege tax statute.[70] The issue of economic impact and argument under the Doctrine of Pre-emption cannot be raised for the first time on appeal.[71] Failure to raise them below precludes their consideration by the Court.[72] [73]

Further, ATK's positions conflict with its pleadings and argument before the District Court. Although it did argue that it was asserting standing in its own right for the first time in oral argument before the District Court, it did not clearly articulate the basis for that standing. Further in its pleadings and oral argument in the District Court, it waived its Supremacy Clause challenge. In Reply to the County's Motion for Summary Judgment, ATK stated: "ATK has not requested relief from this Court based on an asserted violation of the supremacy clause, nor has it asserted a claim on behalf of the Navy."[74] Further, in response to a question from the Court under what theory it had standing, it stated:

> Court: "So is your claim instead of a supremacy claim an equal protection claim?"

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[70] *Id.* at 32.
[71] *Ong International (USA), Inc. v. 11th Avenue Corp.*, 850 P.2d 447, 455 (Utah 1993) (citing *Espinal v. Salt Lake City Bd. of Educ.*, 797 P.2d 412, 413 (Utah 1990)).
[72] 850 P.2d at 455, fn. 31 (citing *State v. Carter*, 707 P.2d 656, 661 (Utah 1985)).
[73] ATK also argues that the District Court committed "reversible legal error" in part because the Court cited *Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n,* 953 P.2d 435 (Utah 1997) in its decision on standing instead of *Co. Bd. of Equal. v. Utah State Tax Comm'n.* However, ATK directed the Court to the *Evans & Sutherland* decision by its reference to it, instead of referring to it as the *Co. Bd. of Equal. v. Utah State Tax Comm'n* case. Counsel for ATK did not give the Court a citation to which case he was relying on. This is important because the issue of ATK's standing in its own right was not raised in ATK's pleadings.
[74] ATK Reply Brief at 17.

> Mr. Crapo: "It would work that way as you look at ATK's claim would be the equal protection. The United States would be the supremacy."

Hearing Transcript at 51, Addendum D.

Thus, it is evident that ATK waived its Supremacy Clause challenge in the District Court and therefore is precluded from asserting it on appeal.

ATK relies on two Utah cases to support its argument that it has standing to raise a challenge under the Supremacy Clause. Neither support ATK's argument. Both are cases wherein the Court held that the County had standing because of its budgeting and taxing functions.[75] *Kennecott* did not involve a challenge under the Supremacy Clause nor the intergovernmental tax immunity of the U.S. In *County Board of Equalization*, the County contended that the Court should interpret an entirely different section of the privilege tax statute so as to avoid potential discrimination against the U.S. However, unlike ATK the County has a constitutional duty to assure that properties are taxed uniformly and equally. ATK is not in the same position as the County. Therefore, these two cases do not support ATK's claim that it has standing to assert a Supremacy Clause challenge to the privilege tax statute based on the alleged assessment of a retained interest in NIROP by the U.S.

ATK then relies on a decision of the Ninth Circuit Court of Appeals. In *California Pharmacists Ass'n v. Maxwell-Jolly*[76] the plaintiffs asserted in their pleadings that they would suffer economic impact if the state statute reducing Medi-Cal payments to

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[75] *Kennecott Corp. v. Salt Lake County*, 702 P.2d 451, 454-55 (Utah 1985); *County Bd. of Equalization v. Utah State Tax Comm'n*, 927 P.2d 176, 181 (Utah 1996).
[76] 563 F.3d 847 (9th Cir. 2009).

hospitals and pharmacies by 10% became effective. Their Supremacy Clause argument was based on the doctrine of preemption; it did not involve the doctrine of intergovernmental tax immunity. The reliance on the case is further misplaced and inapplicable because the plaintiffs were seeking declaratory and injunctive relief to preclude the implementation of the statute by State officials which conflicted with a federal statute.

The U.S. Supreme Court has upheld the constitutionality of state privilege tax statutes wherein lessees and permittees of the U.S. have been subject to the privilege tax.[77] Therefore the doctrine of preemption of the Supremacy Clause does not apply in the case of intergovernmental tax immunity.

Based on the foregoing, the Court should affirm the District Court's decision that ATK did not have standing to assert a Supremacy Clause challenge based on the United States' immunity from taxation; and, should not consider the issue and argument raised for the first time on appeal that ATK suffered economic impact and has standing under the doctrine of preemption to challenge Utah's privilege tax statute as violating the Supremacy Clause.

III. THE DISTRICT COURT DID NOT ERR WHEN IT CONCLUDED THAT THE PRIVILEGE TAX DOES NOT VIOLATE THE SUPREMACY CLAUSE.

ATK asserts that when a privilege tax assessment is based on the full value of exempt property, the Supremacy Clause is violated because the government's retained

[77] *United States v. Township of Muskegon*, 355 U.S. 484, 78 S. Ct. 483, 2 L. Ed.2d 436 (1957); *United States v. City of Detroit*, 355 U.S. 466, 2 L. Ed.2d 424, 78 S. Ct. 474 (1958).

interest is taxed.[78] ATK further contends that three circuit courts have rejected privilege tax provisions which require the privilege tax to be calculated based on the full value of the exempt property rather than the value of the taxpayer's beneficial use of the property. ATK's reliance on these cases is misplaced and its analysis is flawed.

In *United States v. New Mexico*, the United States Supreme Court ruled:

> Tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.[79]

Relying on *New Mexico*, the Ninth Circuit stated: *New Mexico* fashioned a separation of powers framework for analyzing supremacy clause challenges to state taxation:[80]

> if the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision, ... But absent congressional action, we have emphasized that the States' power to tax can be denied only under the clearest constitutional mandate.

The *New Mexico* test has set the standard for determining the constitutionality under the Supremacy Clause of a state tax upon a federal contractor. The Government's "immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually

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[78] ATK's Opening Brief at 34, fn. 11.
[79] *United States v. New Mexico*, 455 U.S. 720, 733 (1982).
[80] *U.S. v. County of San Diego*, 965 F2d. 691, 697 (9th Cir. 1992) (quoting *U.S. v. New Mexico*, at 737).

falls on the Government."[81] Moreover, it is permissible for the state to compute the value of the "beneficial use" with reference to the value of the property itself.[82]

In determining whether the tax is a levy directly on the United States government the courts have looked carefully at the wording of the statute, generally striking down any statute which purports to tax the property itself, where the "legal incidence" of the tax falls on the Government, while upholding taxes on the "beneficial use" of the property by a private entity. If the tax falls upon a private entity, the fact that the costs might indirectly fall upon the Government does not invalidate the tax.[83]

Rather than arguing that it meets the Supreme Court's standard stated in *New Mexico*, ATK implicitly urges the Court to ignore Supreme Court precedent and adopt a new standard: it is exempt because it does not have exclusive possession or control of NIROP because the Navy has the right to exercise oversight over the use of the property and therefore it also has possession or control of the property. Apparently, according to ATK, possession and control is a "retained interest" which is taxed by the County. ATK primarily relies on two circuit court cases to support its claim that the privilege tax violates the United States' Constitution. These cases are distinguishable, have been limited by subsequent decisions of the same circuit court or by the Supreme Court, and neither hold that the contractor is exempt because it does not have possession or control vested solely in itself.[84]

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[81] *U.S. v. City of Detroit*, 355 U.S. at 469.
[82] *Id.* at 470.
[83] *Thiokol Chemical Corporation v. Peterson*, 393 P.2d 391 (Utah 1964).
[84] It is noteworthy that ATK is arguing for immunity, not the United States, which is the

The first case is *United States v. Nye County, Nevada,*[85] which is distinguishable on the facts and the law. Arcata Associates, Inc. (Arcata), a defense contractor, maintained and operated government-owned electronic equipment. Arcata (unlike ATK) did not have the right to use the equipment for its own account or business.[86] Nevada's privilege tax statute, according to the Ninth Circuit, was a tax measure levied on the property itself.[87] Notably, the court found that privilege tax statutes which survive constitutional challenge "have been tax measures imposed on an isolated possessory interest or on a beneficial use of United States property;"[88] these statutes which have survived challenge are similar to Utah's privilege tax statute.

Circuit Judge Noonan dissented in *Nye* accusing the majority of "embark[ing] again on the course that [*United States v. New Mexico*] tried to block of letting 'wooden formalism' determine the great constitutional issue of the allocation of taxing power between the federal government and the states."[89] He also noted that in both *Colorado* and *Hawkins County*, cases relied on by *Nye I* and ATK, the tax exceeded the profit of the contract.[90]

Plaintiff in every case cited by ATK for authority that NIROP is exempt from the privilege tax by virtue of the Supremacy Clause, which suggests that the United States does not take the position that ATK's use of NIROP is exempt from privilege tax under federal law.

[85] *United States v. Nye County, Nevada*, 938 F.2d 1040 (9th Cir. 1991) (Noonan, J., dissenting).

[86] *Id.* at 1041.

[87] 938 F.2d at 1042.

[88] *Id.*

[89] *Id.* at 1043.

[90] *Nye*, 938 F.2d at 1044.

Apparently heeding Judge Noonan's criticism, the Ninth Circuit limited *Nye's* precedential value finding that its decision was based solely on Nevada's statutory language.[91] The Ninth Circuit, in *County of San Diego*, noted that it recognized in *Nye County* that Nevada could enact a valid statute which taxed the lessee's possessory interest in, or the beneficial use of property owned by the United States.[92] *County of San Diego* upheld the taxation of a federal contractor and found that California's statute was not constitutionally defective because California taxed the beneficial use of the property (just as Utah does).

The 1991 *Nye County* case has no precedential value in this jurisdiction because it is a Ninth Circuit decision and certiorari was denied.[93] It is not persuasive authority because it has been limited by the Ninth Circuit in subsequent decisions to the specific statutory language found in Nevada's statute; and, Utah's statutory language taxes only the possession or other beneficial use[94] just as Michigan's statute which was upheld by the U.S. Supreme Court as constitutional.

As of June 1999, the *Nye County* decision now has no precedential value even in Nevada because Nevada amended its privilege tax statute "to tax federal contractors' beneficial use of federal property, rather than the property itself."[95]

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[91] *United States v. County of San Diego*, 965 F.2d 691, 695 (9th Cir. 1992).
[92] *Id.* at 964.
[93] 503 U.S. 919, 112 S. Ct. 1292, 117 L. Ed.2d 515 (1992).
[94] Utah Code Ann. § 59-4-101(1)(a).
[95] *See*, Nev. Rev. Stat. § 361.157 (1997) (real property). *Id.* § 361.159 (personal property). *United States v. Nye County*, 178 F.3d 1080, 1084, 1085 (9th Cir. 1999) (holding that federal contractors, including Arcata, the contractor in the 1991 Nye County decision, were subject to Nevada's privilege tax statute, which did not violate the United

The second case relied on by ATK and upon which the 1991 *Nye County* decision rested is *United States v. Colorado*, 627 F.2d 217 (10th Cir. 1980), aff'd sub nom. *Jefferson County v. United States*, 450 U.S. 901, 101 S. Ct. 1335, 67 L. Ed.2d 325 (1981) affirming *United States v. Colorado*, 460 F. Supp. 1184 (D. Colo. 1978), which were decided before *United States v. New Mexico*, in 1982. Rockwell International Corporation (Rockwell) provided the services of its employees under a fixed fee contract and operated Rocky Flats. "No work of any kind on behalf of any private entities has ever been or is now undertaken or carried out at the plant."[96] Further, the United Sates owned all property used in the production process. No property of Rockwell was used or required to be used in the Rocky Flats Operation. The Court also noted that Rockwell did not have a lease, permit or license to the property[97]. In contrast, ATK uses NIROP to produce rocket motors for private entities in addition to the Navy; ATK's own property or property it leases from any other private entity is used to produce the rocket motors for the Navy and private entities with NIROP in a supporting role. Without ATK's manufacturing plant, which it claims is the most modern in the world, the rocket motors would not be produced at its Salt Lake County facilities; and ATK uses NIROP for its sub-contracts with prime contractors or other private entities.

Equally significant is that Colorado's privilege tax statute was struck down as unconstitutional as applied because it did not tax the possession or beneficial use of the

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States Constitution because Nevada shifted the subject of the taxes from the property itself to the beneficial use of that property).

[96] *Colorado*, 460 F. Supp. at 1186.

[97] 627 F.2d at 219.

property but the property itself.[98] Also, practical considerations influenced the trial court. The "tax was approximately twice the value of the contract and [the court] found it unconscionable that the value to a user would be identical to an owner."[99] In striking down Colorado's statute, the Tenth Circuit distinguished the facts involving Rocky Flats from *United States v. City of Detroit* and *United States v. Township of Muskegon.*[100] The Court distinguished *Detroit* because Borg-Warner leased government property and conducted its own private manufacturing business thereon, in contrast to Rockwell which "is merely going onto government owned property where it performs its management services."[101]

In *Muskegon*, Continental Motors Corporation had a permit to use a government owned manufacturing plant where it apparently made goods, which were sold to the United States under contract. *Muskegon*, then, like *City of Detroit*, involved private corporations going onto government property and producing goods which were later sold for a profit. Neither is akin to *Colorado*, where Rockwell was merely performing its contractual obligations on government owned property.[102]

Thus, the Tenth Circuit distinguished between contractors who produce goods on government property, as opposed to those who "merely perform[ ] [their] contractual obligations on government owned property" noting that the former would be subject to

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[98] 460 F. Supp. at 1187.
[99] *United States v. Nye County*, 957 F. Supp. 1172, 1177 (D. Nev. 1997).
[100] *United States v. Township of Muskegon*, 355 U.S. 484, 78 S. Ct. 483, 2 L. Ed.2d 436 (1957).
[101] 627 F.2d at 220
[102] 627 F.2d. at 220.

privilege tax.[103] ATK's use of NIROP to produce goods sold to the United States under contract is similar to *Muskegon* and *City of Detroit* which upheld the state's privilege tax statute.

Although *Colorado's* distinction between services/goods was rejected by the 1999 Ninth Circuit decision in *Nye*,[104] "because we have serious reservations about the practicability of the distinction . . .." and that the Supreme Court has "never invoked *Colorado's* goods/services distinction in evaluating the constitutionality of a tax,"[105] any persuasive authority *Colorado* has favors taxation of ATK's use of NIROP because ATK is producing a product as opposed to providing a service. Therefore, *Colorado* is distinguishable factually because Rockwell was providing only a service as opposed to producing goods and selling them to the government such as ATK does; and, it is distinguishable legally because the Colorado statute, which is similar to Nevada's, differs substantially from Utah's which imposes a tax on the possession or beneficial use of the property by the private entity. Finally, *Colorado's* analysis has not been adopted by any court other than *Nye County* in 1991.

ATK also relies on *U.S. v. Hawkins*.[106] This case is distinguishable because the Sixth Circuit relied on the Tennessee Supreme Court's determination "which held that while the interest of Union Carbide could be subject to a privilege or use tax, it was not a real property interest taxable pursuant to Tennessee's ad valorem real property tax

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[103] *United States v. Nye County*, 178 F.3d at 1085 (quoting *United States v. Colorado*, 627 F.2d 217, 220 (10th Cir. 1980) (alteration in original)).
[104] 178 F.3d at 1085.
[105] *Id.* at 1085
[106] 859 F.2d 20 (6th Cir. 1988), cert. denied, *Tennessee v. U.S.*, 490 U.S. 1005 (1989).

statute."[107] This is not the situation in Utah. The Utah Supreme Court has held that the beneficial use and possession for profit of owner exempt property by an independent contractor is a taxable interest.[108]

Utah's privilege tax statute, which was modeled after Michigan's, was adopted after the Supreme Court upheld the constitutionality of Michigan's statute. In *United States v. City of Detroit*,[109] the United States was the owner of an industrial plant in Detroit. It leased a portion of the plant to Borg-Warner Corp. for use in the latter's manufacturing business. The tax was based on the value of the property leased and computed at the rate used for calculating real property taxes.

The Michigan statute imposed a tax on private lessees and users of tax-exempt property who used such property in a business conducted for profit. Any taxes due under the statute were the personal obligation of the private lessee or user. The owner was not liable for their payment nor was the property itself subject to any lien if they remain unpaid. So far as the United States was concerned as the owner of the exempt property used in that case, it seems there was no attempt to levy against its property or treasury.[110]

In *Muskegon*, a companion case to *City of Detroit*, the Court upheld the assessment of a privilege tax on the permittee's use of a manufacturing plant which the United States provided at no cost to a private company to fulfill its contract to produce

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[107] *Id.* at 21.
[108] *Thiokol*, 393 P.2d 391 (Utah 1964).
[109] *United States v. City of Detroit*, 355 U.S. 466, 2 L. Ed.2d 424, 78 S. Ct. 474 (1958).
[110] *Id.* at 471.

equipment for the government.[111] The United States granted Continental Motors Corporation the right to use the plant in the course of performing several supply contracts Continental had with the United States. The fact that Continental was a permittee instead of a lessee and was using the government owned property to supply the government with products, did not affect the Court's decision that the privilege tax assessments did not violate the Supremacy Clause.[112]

Therefore, under *New Mexico, City of Detroit*, and *Township of Muskegon*, even though ATK is producing a product for which the Navy is one of its customers, the assessment of NIROP as measured by the value of the property, which ATK beneficially uses and possesses, does not violate the Supremacy Clause. The three circuit court cases relied on by ATK are distinguishable or limited by subsequent decisions of either the U.S. Supreme Court or applicable circuit courts.

Based on the foregoing, the Court should affirm the District Court's decision and should not find Utah's privilege tax statute unconstitutional either as applied or on its face.

CONCLUSION

Applying Utah law to undisputed facts, this Court should rule that ATK was in exclusive possession of the NIROP property as of 1 January 2000, as contemplated in Utah Code Ann. § 59-4-l01(3)(e) through its permitted possession and use of the premises under its Facilities Use, Capital Maintenance and Production Contracts and

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[111] *United States v. Township of Muskegon*, 355 U.S. 484, 2 L. Ed.2d 436, 78 S. Ct. 483 (1958).
[112] *Id.* at 486.

subcontracts, even though the land-owner, the Navy, retained traditional levels of management and control in the NIROP Property. No one else other than the land owner (*i.e.*, the Navy), had any possession, use, management, or control of the NIROP Property during 2000. The facts of this case are consistent with those in *Thiokol Chemical Corporation v. Peterson* where this Court affirmed the validity and imposition of Utah's privilege tax statute.

The Court should further conclude that ATK failed to meet the *Shelledy* test and thus did not have standing to raise a Supremacy Clause claim challenging the imposition of the privilege tax to ATK; and, that it failed to preserve its claim of economic impact to support its claim to standing. And even if ATK did have standing, which it does not, the tax imposed under Utah Code Ann. § 59-4-101 is constitutional and does not violate the Supremacy Clause of the United States Constitution. ATK had "exclusive possession" of the NIROP Property. Since ATK's possession was exclusive, its beneficial use of the NIROP Property was the value of the NIROP Property and no tax was assessed against the federal government.

Finally, the County concurs with the arguments set forth in the brief of Appellee Utah State Tax Commission and adopts them herein by reference. This Court should affirm on all points the ruling of the District Court.

RESPECTFULLY SUBMITTED this 2nd day of August, 2010.

LOHRA L. MILLER
SALT LAKE DISTRICT ATTORNEY

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MARY ELLEN SLOAN
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August, 2010, I mailed two true and correct copies of the foregoing, BRIEF OF APPELLEE SALT LAKE COUNTY BOARD OF EQUALIZATION, as well as a courtesy electronic copy in searchable pdf format on a disc, via U.S. Mail, postage prepaid, to the following:

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ADDENDUM A – District Court Decision and Order

IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

ALLIANT TECHSYSTEMS, INC., Petitioner, vs. SALT LAKE COUNTY BOARD OF EQUALIZATION, UTAH STATE TAX COMMISSION, and GRANITE SCHOOL DISTRICT, Respondents.	**RULING ON PETITIONER'S AND RESPONDENTS' CROSS MOTIONS FOR SUMMARY JUDGMENT** Case No. 030917933 (Third District Court case number) Judge Jon M. Memmott

This matter is before the Court on the parties' cross motions for summary judgment. The Court has reviewed the moving and responding papers, along with their supporting documentation, and the Court's case file. The Court also held a hearing on October 26, 2009. Having considered all of the arguments, and being fully advised as to the premises, and for the reasons set forth herein, the Court DENIES the Petitioner's motion and GRANTS the Respondents' motion.

BACKGROUND

In the year 2000, Petitioner, Alliant Techsystems, Inc. ("**ATK**"), manufactured missile rocket motors for private companies who, ultimately, provided these missile rocket motors to the United States Navy. ATK used property known as the Naval Industrial Reserve Ordinance Plant (the "**NIROP Property**") to produce these missile rocket motors. The NIROP Property was

comprised of six (6) parcels constituting approximately 528.48 acres of land and 181 improvements. The United States Navy (the "**Navy**") owned the NIROP Property and ATK used the NIROP Property under a facilities use agreement. This contract allowed ATK to use the NIROP Property on a rent-free non-interference basis. No other private company used the NIROP Property for any purpose and no other entity had a facilities use contract permitting use of the NIROP Property. However, the Navy had one (1) building and maintained fourteen (14) employees to manage the NIROP Property and inspect ATK's operations.

Of the 181 improvements on the NIROP Property, ATK used 165 in connection with its operations, the Navy used 1 for maintenance of the NIROP Property and oversight of ATK and its operations, and 15 were vacant.

In 2000, Salt Lake County assessed ATK a privilege tax against the NIROP Property, pursuant to Utah Code Ann. § 59-4-101, based on the value of the property possessed or beneficially used by ATK. The Salt Lake County assessor determined that 144 of the improvements contributed 99.7% of the value of the NIROP Property, and that 15 of the improvements contributed no value.

ATK has exhausted all of its administrative remedies through the Utah State Tax Commission and comes to the Court seeking relief from the assessed privilege tax imposed under Utah Code Ann. § 59-4-101 based on an exemption found in subsection 3(e) of the statute. ATK argues that the Navy's retained control of the NIROP Property resulted in ATK having less than "exclusive possession." ATK also argues that assessing a privilege tax according to the full value of the property was a violation of the Supremacy Clause of the United States Constitution as a tax on the federal government's retained interest in the NIROP Property.

Respondents argue that ATK was subject to the privilege tax under Utah Code Ann. §59-4-101. Respondents argue that ATK did not qualify for the exception to the tax contained within subsection 3(e) because ATK did not have a lease, permit, or easement from the Navy and/or because ATK had exclusive possession of the NIROP Property.

Following a telephone conference on issues before this court,[1] a complete briefing of the parties' cross motions, and at the conclusion of the October 26, 2009 hearing, the Court took the matter under advisement. Accordingly, the cross motions are now ripe for determination.

ANALYSIS

Summary judgment is appropriate only when, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c).

Here, the parties acknowledged at the October 26, 2009 hearing that the relevant material facts to the parties' motions for summary judgment are not disputed. The court will therefore adopt the factual assertions of the parties' pleadings as its findings in this case. (See Petitioner's Memorandum in Support of Motion for Summary Judgment; Respondents' Memorandum in Support of Motion for Summary Judgment.). Accordingly, the Court shall make its determination on the parties' motions for summary judgment as a matter of law. Two issues are presented for the Court's determination.

[1] According to the strict reading of the parties' Settlement Agreement dated October 1, 2007, the parties were only to litigate the issue of whether ATK can claim an exemption to the privilege tax. (See Joint Motion for Entry of Order Resolving All Valuation Claims and for Stay Pending Transfer and Reassignment for Further Proceedings). During the September 11, 2009 telephone conference with the parties, the Court inquired whether the Settlement Agreement barred ATK's Supremacy Clause argument. Following the telephone conference, however, the parties informed the Court of their stipulation and agreement that the Settlement Agreement does not bar ATK from raising its Supremacy Clause argument with the Court. Accordingly, this Ruling will address both of the issues raised by ATK.

I. Can ATK claim an exemption to the privilege tax assessed under Utah Code Section 59-4-101?

"[A] tax is imposed on the **possession or other beneficial use** enjoyed by any person of any real or personal property which for any reason is exempt from taxation, if that property is used in connection with a business conducted for profit." Utah Code Ann. § 59-4-101(1)(a) (emphasis added). However, a tax is not imposed on "the use or possession of any lease, permit, or easement unless the lease, permit, or easement entitles the lessee or permittee to **exclusive possession** of the premises to which the lease, permit, or easement relates." Utah Code Ann. § 59-4-101(3)(e) (emphasis added).

It is not disputed that the NIROP Property was exempt from state property taxation because it was owned by the federal government. See Utah Code Ann. § 59-2-1101(3)(a). Further, it is undisputed that ATK used the NIROP Property in connection with a business conducted for profit. Accordingly, the only remaining issues in this matter are: A) Did ATK have a permit[2] entitling it to use or possession of the NIROP Property; and B) Did ATK have exclusive possession of the NIROP Property?

A. Did ATK have a permit to use the NIROP Property?

According to Black's Law Dictionary, the terms "permit" and "license" are synonymous and a "license" is defined as "[a] revocable permission to commit some act that would otherwise be unlawful . . . ." Black's Law Dictionary 418, 524 (2d Pocket ed. 2001). Pursuant to ATK's facilities use agreement, ATK had permission to occupy and use the NIROP Property, something that would otherwise be illegal (as a trespass) absent the Navy's permission. When asked at the October 26, 2009 hearing what ATK had, if not a lease, a permit, or an easement, Respondents'

[2] Respondents argue that ATK did not have a lease, permit, or an easement. ATK argues that it had a permit. There is not contention that ATK had a lease or easement with regard to the NIROP Property.

were without an answer and readily admitted their argument that ATK did not have a permit was "weak." The Court agrees and, accordingly, finds that the facilities use agreement is a permit.

B. Did ATK have exclusive possession of the NIROP Property?

Whether ATK had exclusive possession of the NIROP Property "is a matter of statutory construction and therefore is a conclusion of law." Gull Labs., Inc. v. Utah State Tax Comm'n., 936 P.2d 1082, 1084 (Utah Ct. App. 1997). This Court is to "construe statutes that grant exclusions from taxation strictly against the party seeking an exemption, and that party, accordingly, bears the burden of proving that it qualifies for the exemption sought." Id. (quotations omitted). See also, Great Salt Lake Minerals & Chemicals Corp. v. State Tax Comm'n. of Utah, 573 P.2d 337, 340 (Utah 1977) ("Exemptions from taxation are to be strictly construed and all ambiguities are to be resolved in favor of taxation."). Further, this Court will "read the words of a statute literally unless such a reading is unreasonably confused or inoperable . . . [and] presume that the statute is valid and that the words and phrases used were chosen carefully and advisedly." Gull Labs., Inc., 936 P.2d at 1084 (quotations omitted).

ATK argues it did not have exclusive possession of the NIROP Property because the Navy retained some amount of management and control of the NIROP Property. ATK relies on Keller v. Southwood North Medical Plaza, Inc. to argue that a lease transfers exclusive possession but that a permit does not. 959 P.2d 102, 107 (Utah 1998). While this interpretation may be appropriate for forcible entry actions, such as in Keller, this interpretation would render the language of Utah Code Ann. § 59-4-101 non-sensical. By their very definition and operation, a lease, a permit, and an easement transfer less than the full bundle of rights held by the landowner. Additionally, the language of the statute contemplates that a person may have exclusive possession under a lease, a permit, or an easement. See Utah Code Ann. § 59-4-

101(3)(e). If, as ATK argues, the statute's use of exclusive possession excepted the retention of management and control by the landowner (i.e. the Navy), the privilege tax could only be assessed against a landowner in fee-simple. Such a reading is "unreasonably confused and inoperable," because the landowner in fee simple, the Navy, is exempt from property taxes under Utah Code Ann. § 59-2-1101(3)(a). Gull Labs., Inc., 936 P.2d at 1084 (quotations omitted).

Moreover, in this matter, much of the management and control exercised by the Navy on the NIROP Property was ancillary to ATK's operations and, therefore, beneficial to ATK. Cf. Loyal Order of Moose v. County Bd. Of Equalization of Salt Lake County, 657 P.2d 257, 261-63 (Utah 1982). For example, the Navy used their office at ATK's administration building in Plant One to provide technical assistance to ATK in their fulfillment of Navy contracts. Additionally, the fourteen (14) Navy personnel were on site to manage the NIROP Property and assist ATK in the fulfillment of Navy contracts.

Accordingly, because the Court is to interpret taxation statutes strictly against ATK, and since there is a presumption that the statute is valid, the Court concludes that ATK was in exclusive possession of its permit, as contemplated in Utah Code Section 59-4-101(3)(e), even though the land-owner, the Navy, retained traditional levels of management and control in the NIROP Property. ATK has presented no evidence or argument that anyone other than the Navy, the land-owner, had any possession, use, management, or control of the NIROP Property during 2000. Accordingly, the Court finds that ATK has not met its burden and is not able to avoid the privilege tax assessed under Utah Code Section 59-4-101.

II. Is the tax imposed under Utah Code Section 59-4-101 a violation of the Supremacy Clause of the United States Constitution?

ATK argues that the privilege tax Salt Lake County assessed against ATK was a violation of the Supremacy Clause of the United States Constitution because such tax was based on the full value of the NIROP Property and was not apportioned for the management and control retained by the Navy. See U.S. Const. art. VI, § 2. However, the Court finds that ATK does not have standing to raise this issue on behalf of the United States government.

The Supremacy Clause of the United States Constitution creates rights for the federal government, not for private individuals. Id. In Shelledy v. Lore, the Utah Supreme Court established a three-part test to determine when a party may assert the constitutional rights of a third party. 836 P.2d 786, 789 (Utah 1992). Under this test, the following factors must be established:

> First, the presence of some substantial relationship between the claimant and the third parties; second, the impossibility of the rightholders asserting their own constitutional rights; and third, the need to avoid a dilution of third parties' constitutional rights that would result were the assertion of jus tertii not permitted.

Id.

In this matter, even assuming the presence of a substantial relationship between ATK and the federal government, there is no impossibility of the federal government raising its own rights under the Supremacy Clause[3] and there is no dilution of the federal government's rights by finding that ATK does not have standing to raise a claim on the federal government's behalf.

[3] In all cases cited by ATK in support of its argument that the assessment of the privilege tax is a violation of the Supremacy Clause, the United States is the party asserting its own rights under the Supremacy Clause. See e.g. U.S. v. County of Fresno, 429 U.S. 452 (1977); U.S. v. Nye County, 178 F.3d 1080 (9th Cir. 1999); U.S. v. Nye County, 938 F.2d 1040 (9th Cir. 1991); U.S. v. Hawkins County, 859 F.2d 20 (6th Cir. 1988); U.S. v. Colorado, 627 F.2d 217 (10th Cir. 1980).

Accordingly, the Court finds that ATK cannot establish the second and third requirements under the Shelledy test.

ATK argues that Evans & Sutherland Computer Corporation v. Utah State Tax Commission allows the Court to hear constitutional issues raised by a party on behalf of a third party when interpreting the constitutionality of a statute. 953 P.2d 435 (Utah 1997). In Evans & Sutherland Computer Corporation, however, the constitutional rights being asserted are those of the defendant, not a third party, and thus, the case is inapplicable to this matter. Id. Accordingly, the Court finds that ATK does not have standing to assert that the assessed privilege tax is a violation of the Supremacy Clause on behalf of the federal government.

Further, the Court notes that even assuming ATK has standing to assert their Supremacy Clause argument, the privilege tax assessed against ATK would not be unconstitutional. ATK argues that Salt Lake County assessed the privilege tax against both their beneficial use and against the rights retained by the Navy. However, Utah Code Ann. § 59-4-101 provides that "a tax is imposed on the **possession or other beneficial use** enjoyed by any person . . . ." Utah Code Ann. § 59-4-101(1)(a) (emphasis added). The Court has already found that ATK had "exclusive possession" of the NIROP Property. If ATK's possession of the NIROP Property was exclusive, its beneficial use of the NIROP Property was the value of the NIROP Property and there was no tax assessed against the Navy. See U.S. v. New Mexico, 455 U.S. 720, 741-42 (1982).

Additionally, and contrary to ATK's assertions, the privilege tax was apportioned according to ATK's beneficial use. ATK exclusively possessed and/or beneficially used all but

15 of the improvements on the NIROP Property.[4] Salt Lake County did not assess a privilege tax against the unused buildings as they were found to have no value. Accordingly, Salt Lake County only assessed a privilege tax against ATK for the actual possession and the actual other beneficial use ATK enjoyed on the NIROP Property. [5]

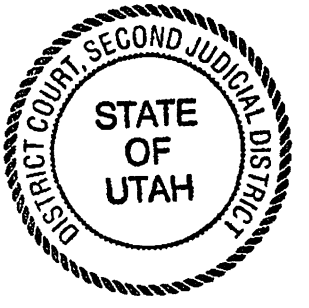
CONCLUSION

Accordingly, ATK's arguments in favor of summary judgment are without merit. Based on the foregoing, the Court must DENY the Petitioner's motion for summary judgment and GRANT the Respondents' motion for summary judgment. The Court directs Respondents to prepare and submit an order that is consistent with and reflects this Ruling. Further, in accordance with Rule 6-103(6) of the Utah Code of Judicial Administration, the Court shall order this Ruling published.

Date signed: 11/12/09.

Jon M. Memmott

DISTRICT COURT JUDGE
JON M. MEMMOTT



[4] ATK may argue that there are 16 improvements that were not used by ATK, i.e. as the Navy used one of the buildings. However, the Navy's use of that building was for ATK's benefit to supervise ATK's operations and maintain the NIROP Property. Accordingly, the Navy administration building was beneficially used, if not exclusively possessed, by ATK.

[5] The Court notes that ATK failed to argue that the privilege tax assessed is a violation of the Equal Protection Clause of the United States Constitution. See U.S. Const. amend. XIV. However, the Court believes that, for the same reasons the tax would not violate the Supremacy Clause, it does not violate the Equal Protection Clause.

MAILING CERTIFICATE

I certify that I sent a true and correct copy of the foregoing **RULING ON PETITIONER'S AND RESPONDENTS' CROSS MOTIONS FOR SUMMARY JUDGMENT** postage pre-paid, to the following on this date: 11/12/09.

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

ALLIANT TECHSYSTEMS, INC., Petitioner, v. SALT LAKE COUNTY BOARD OF EQUALIZATION, UTAH STATE TAX COMMISSION, and the GRANITE SCHOOL DISTRICT Respondents.	**FINAL ORDER ON APPLICATION OF UTAH'S PRIVILEGE TAX** Civil No. 030917933 2000 Tax Year Tax Court Judge: JON M. MEMMOTT

The Court has reviewed the parties' cross motions for summary judgment, including the moving and responding papers along with their supporting documentation and the Court's case file. Oral argument was held 26 October 2009, where David J. Crapo appeared for Petitioner Alliant Techsystems, Inc. ("ATK"), Mary Ellen Sloan and Kelly W. Wright appeared for Respondent Salt Lake County Board of Equalization ("BOE"), and John C. McCarrey and Laron J. Lind appeared for Respondent Utah State Tax Commission. After being fully advised in the premises, the Court issued its Ruling on Petitioner's and Respondent BOE's Cross Motions for

Summary Judgment and published the same on 12 November 2009. Consistent with the Court's ruling, the reasons set forth therein, and with good cause appearing therefore,

IT IS HEREBY ORDERED that Petitioner ATK is subject to the privilege tax assessed under Utah Code Ann. § 59-4-101 for tax year 2000. Respondent BOE's Motion for Summary Judgment is GRANTED and Petitioner's Motion for Summary Judgment is DENIED. The Court adopts the factual assertions of the parties' pleadings contained in Respondent BOE's Memorandum in Support of Motion for Summary Judgment and in Petitioner's Memorandum in Support of Summary Judgment and concludes there are no material facts in dispute.[1] Applying Utah law to the undisputed facts, the Court further concludes that ATK was in exclusive possession of the Naval Industrial Reserve Ordnance Plant ("NIROP") as of 1 January 2000, as contemplated in Utah Code Ann. § 59-4-101(3)(e) through its permitted possession and use of the premises under its Facilities Use, Capital Maintenance and Production Contracts and subcontracts, even though the land-owner, the Navy, retained traditional levels of management and control in the NIROP Property. No one else other than the land-owner (*i.e.*, the Navy), had any possession, use, management, or control of the NIROP Property during 2000.

IT IS FURTHER ORDERED that the tax imposed under Utah Code Ann. § 59-4-101 does not violate the Supremacy Clause of the United States Constitution. The Supremacy Clause of the United States Constitution creates rights for the federal government, not for private individuals. Under *Shelledy v. Lore*, 836 P.2d 786 (Utah 1992), the Utah Supreme Court

[1] When the BOE filed its opposition to ATK's Motion for Summary Judgment, it also filed a Motion to Strike Portions of the Affidavit of Kim Abplanalp. Mr. Abplanalp is the Director of Business Operations for ATK's Space Launch Systems and he had submitted an affidavit setting forth certain facts relied on by ATK in its Motion for Summary Judgment At the 26 October 2009 oral argument, the Court denied the BOE's Motion to Strike Portions of the Affidavit of Kim Abplanalp.

established a three-part test to determine when a party may assert the constitutional rights of a third party: "First, the presence of some substantial relationship between the claimant and the third parties; second, the impossibility of the rightholders asserting their own constitutional rights; and third, the need to avoid a dilution of third parties' constitutional rights that would result were the assertion of jus tertii not permitted." *Shelledy*, 836 P.2d at 789. The Court finds that ATK cannot establish the second and third requirements under the *Shelledy* test and therefore does not have standing to raise the Supremacy Clause claim.

Even assuming ATK had standing to assert its Supremacy Clause argument, which it does not, the privilege tax assessed against ATK is constitutional. ATK had "exclusive possession" of the NIROP Property. Since ATK's possession was exclusive, its beneficial use of the NIROP Property was the value of the NIROP Property and no tax was assessed against the Navy.

DATED this 9th day of December, 2009.

Jon M. Memmott

HONORABLE JON M. MEMMOTT
Tax Court Judge

CERTICATE OF SERVICE

I hereby certify that on the ____ day of December, 2009, I caused to be sent via U.S. mail, postage prepaid, a true and correct copy of FINAL ORDER ON APPLICATION OF UTAH'S PRIVILEGE TAX to the following:

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kwright@slco.org

By: _____

ADDENDUM B – Tax Commission Decision for 2000 Tax Year

STATE OF UTAH
UTAH STATE TAX COMMISSION
210 North 1950 West Salt Lake City, Utah 84134

Michael O. Leavitt
Governor

Olene S. Walker
Lieutenant Governor

Pam Hendrickson, Commission Chair
R. Bruce Johnson, Commissioner
Palmer DePaulis, Commissioner
Marc B. Johnson, Commissioner
Rodney G. Marrelli, Executive Director

July 16, 2003

Dear Parties:

The Final Order for Alliant Techsystems, Inc., Appeal No. 01-0974, was inadvertently mailed without the state seal and date. This is the same order with today's date and the official seal.

G. Blaine Davis, Administrative Law Judge

BEFORE THE UTAH STATE TAX COMMISSION

ALLIANT TECHSYSTEMS,	) **FINDINGS OF FACT, CONCLUSIONS**) **OF LAW, AND FINAL DECISION**	
Petitioner,	) Appeal No.	01-0974
v.	) Tax Type:	Property Tax/Locally Assessed
BOARD OF EQUALIZATION OF SALT LAKE COUNTY, STATE OF UTAH,	) Tax Year:	2000
Respondent.	) Judge:	Davis

Presiding:

G. Blaine Davis, Administrative Law Judge
Palmer DePaulis, Commissioner
Marc B. Johnson, Commissioner

Appearances:

For Petitioner: Mr. Maxwell Miller, from the law firm of Parsons, Behle & Latimer
Mr. Randy Grimshaw, from the law firm of Parsons, Behle & Latimer

For Respondent: Mr. Bill Thomas Peters, from the law firm of Parsons, Davies, Kinghorn & Peters
Ms. Mary Ellen Sloan, Deputy Salt Lake County Attorney

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on November 19, 2002 through November 22, 2002. Each party submitted its Proposed Findings of Fact, Conclusions of Law and Final Decision, and Briefs on or before February 21, 2003. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

PROCEDURE AND ORIGINAL VALUE

1. The tax in question is property tax.

2. The year in question is 2000. The lien date is January 1, 2000.

3. The Salt Lake County Assessor initially valued the land and improvements at $238,367,000. That value was sustained by the Salt Lake County Board of Equalization.

DESCRIPTION OF THE PROPERTY

4. Alliant either owns or is a permittee of the subject property, which is operated as a solid rocket motor manufacturing facility, commonly called the "Bacchus Works." Bacchus Works is located at approximately 4600 South 7200 West, West Valley City, Utah, on approximately 4,278 acres of land. Bacchus Works is comprised of over 600 buildings and structures with a gross usable area of approximately 1.9 million square feet.

5. The subject property is zoned for commercial and industrial purposes and West Valley City and Salt Lake County have imposed an over-pressure zone which prohibits residential development around the site. Gullies and canyons divide the property and a railroad right-of-way exists through the subject property, so the site cannot be fully utilized because of the development difficulty posed by the subject's terrain and other limitations. The property is not vacant or available for development for residential use. There was no evidence of the likelihood of a change in the zoning from industrial to residential. The buildings and structures are widely dispersed because of the highly explosive nature of the manufactured products.

6. The Bacchus Works includes three plants: Plant One, Bacchus West, and the

Naval Industrial Reserve Ordinance Plant ("NIROP").

7. Plant One includes 464 buildings, 201 of which are primary buildings, and 263 of which are support and storage buildings containing approximately 983,000 square feet in the aggregate. The use of the buildings at Plant One ranges from administrative, directive, and security offices to storage, shipping and receiving warehouses, and bunkered high-tech research and development facilities.

8. Bacchus West is the newest and most modern facility at the Bacchus Works and includes approximately 33 major buildings and 18 support and storage buildings. Bacchus West includes specialized features which are uniquely geared toward the construction of rocket motors. The improvements also include excavated silos used to inject propellants into rocket motor casings.

9. The Naval Industrial Reserve Ordinance Plant (NIROP) is owned by the United States Navy. It includes approximately 59 major structures and 83 support buildings containing approximately 456,000 square feet.

NAVAL INDUSTRIAL RESERVE ORDINANCE PLANT (NIROP) EXEMPTION STATUS

10. Alliant uses property referred to as NIROP owned by the United States Navy in connection with its business at Bacchus Works. NIROP consists of 528.48 acres and 181 improvements. Alliant uses 165 improvements at NIROP in connection with its business to fulfill and perform its government contracts. The uses and features of the structures within this facility (NIROP) are similar to those of Plant One.

10. Petitioner has alleged that the NIROP property is exempt from both the property taxes and the privilege tax imposed by Utah Code Ann. §59-4-101, et.seq.

11. Alliant's use of NIROP is pursuant to a facilities use contract with the United States Navy. The contract provides "that the terms and conditions of the facilities use contract shall apply to these facilities provided to the contractor by the Government...for the contractor's use in performance of contracts or subcontracts, or both, for the Fleet Ballistic Missile (FBM) systems. The contractor agrees to use, maintain, account for, and dispose of such facilities in accordance with the terms and conditions of this facilities use contract." Respondent's Exhibit 4, Part 1, Section B.

12. NIROP is used by Alliant in the performance of its supply subcontract to produce the Trident II missile. Alliant has employees who work routinely at NIROP in connection with its for-profit business.

13. There are 181 improvements located at NIROP. Phillip Cook testified that 15 of those improvements no longer contribute value, six contribute less than $1,000 value each, and 16 contribute less than $5,000 value each, and 144 of the improvements contribute 99.7% of the value for NIROP. Robert Reilly testified that 46 of the 181 improvements are either fully or partially functionally obsolete; therefore, at least 135 of the 181 improvements are fully functional.

14. The Navy's administrative offices are in the administration building at Plant One. When a guest enters Alliant's facilities at NIROP, such guests must sign in and receive a badge.

15. The Navy Strategic Systems Program maintains an office at Plant One for the purpose of providing technical assistance under Navy supply and facilities contracts.

16. The NIROP property is and has been used for Navy Fleet Ballistic Missile (FBM) programs, including D5 (Trident), C3 (Trident), C4 (Poseidon), and A3 (Polaris), which are

all U.S. Navy missile systems worked on by Petitioner.

17. First priority for the use of NIROP is given to work on behalf of the Navy. Contract, Section H. Special Contract Requirements at 3,¶ 3.

18. Alliant must obtain approval before making either capital modifications to or usage changes of facilities. Contract, Section H. Special Contract Requirements at 3, ¶ 4.

19. The Federal Acquisition Regulations (FAR) 52.245-11(e)(1) requires the Contractor (Alliant) to notify the Contracting Office...(1) Whenever use of all facilities for government work in any quarterly period averages less than 75 percent of the total use of the facilities."

20. Alliant operates NIROP within the bounds of the Facilities Use Contract and its rights to the facility are determined by that contract.

21. The entire Bacchus Works Facility, including NIROP, is enclosed in fencing, warns trespassers to keep out and is not open to the public. No member of the public may gain entrance to the Bacchus Works, including NIROP, without the express permission of Alliant.

22. In order to gain access to the Bacchus Works facility, including NIROP, one must pass through Alliant's designated entrance, register with Alliant's security officers at Alliant's administration building, obtain permission from an Alliant employee to gain access, wear an Alliant identification badge, and be transported to, from and through the facility by an Alliant employee in an Alliant vehicle.

23. The entrance of NIROP does not require separate permission, registration, identification, or accompaniment by a Navy employee.

24. The Navy's Trident II (commonly called the D-5) rocket motor is not primarily produced at NIROP. The primary manufacturing process of the Trident rocket motor is at Alliant's privately owned facility located at Bacchus West. NIROP property is used in a supporting role in the manufacturing process, but all of the actual rocket motor manufacturing occurs on Alliant's privately owned property.

25. Lockheed Martin, the prime contractor for the Titan (and Trident), has an on-site team, located very close to Alliant's program office, and the Lockheed Martin team communicates and interacts daily with Alliant employees.

26. The Navy does have some employees on the property who are there primarily for repair, maintenance, and administrative purposes.

27. On January 6, 2003, the Commission received a letter from Mr. Maxwell A. Miller, counsel for Alliant, which contained the following statements:

> Ms. Sloan's letter impliedly raises a critical issue concerning the Tax Commission's appropriate role in Alliant's 2000 valuation case pending before it. On the one hand, the Tax Commission is supposed to be an impartial adjudicator of the issues presented, including the NIROP issues Alliant raised in the 2000 proceedings. The Tax Commission's decisions are to be based exclusively on the evidence. *See, e.g.* Utah Code Ann. §63-46b-10(1)(a). On the other hand, the Tax Commission intervened in the independent NIROP action as an adverse party to, and as an advocate against, Alliant. The incompatibility of simultaneously acting as an impartial adjudicator and an advocate in the same matter is obvious. In fact, Judge Lynn Davis commented that the Tax Commission had acted improperly by attempting to "contest" proposed supplemental facts Alliant submitted in the NIROP action. Said the Court, "A contestation of the facts by the Utah State Tax Commission may cross the line into an advocacy role, may suggest partiality of the State Tax Commission, and would hopelessly weaken or destroy its jurisdictional arguments based upon an exhaustion of administrative remedies theory." Tax Court Ruling (Sept. 7, 2001) p. 6.
>
> With respect to NIROP action, Alliant submits the Tax Commission cannot simultaneously adjudicate the NIROP issues in Alliant's pending 2000 assessment case and participate as a Defendant-Intervenor in the NIROP action,

without violating Alliant's constitutional due process rights. Simultaneous participation in such incompatible roles may trigger an action against the Tax Commission. To avoid this problem, Alliant recommends that the Tax Commission, as a matter of comity, abstain from deciding the NIROP issues in Alliant's 2000 valuation case pending before the Commission.

LAND VALUE

29. In the prior proceeding for this same property, the parties stipulated to the land values for each year, excluding any effect of contamination and/or stigma as follows:

YEAR	VALUE
1997	$35,545,692
1998	$39,322,360
1999	$41,052,358

30. For the current year of 2000, Mr. Robert Reilly for Petitioner, and Mr. Philip Cook for Respondent each made an estimate of the land value, excluding any effect of contamination and/or stigma, by examining sales of large parcels of property in the general area. Notwithstanding that they each selected different comparable sales, Mr. Cook estimated the value of the land to be $10,750 per acre, or a total value of $44,660,875 which he rounded to $44,660,000. Mr. Reilly estimated a value for the land of $10,664 per acre, or a total site value, before environmental considerations, of $44,458,589. Those individuals also used a difference of approximately 14.5 acres, but the overall differences in land value are not material. The primary issues relating to land value are whether the deductions taken by Mr. Reilly for "RCRA Corrective Action Program Liability adjustment," "Delay in sale," 'Stigma,'" "Additional Financing Costs 'Stigma,'" and "Cost to Repair Natural Resources Damages" are appropriate. Mr. Cook determined that it was not

appropriate to take deductions from the land value for any of those items.

ENVIRONMENTAL CONTAMINATION

31. The highest and best use of the subject property as improved is its existing industrial use.

32. The zoning for the subject property is industrial manufacturing.

33. The subject property is subject to a partial remediation plan under the Resource Conservation and Recovery Act (RCRA) for soil contamination.

34. The Bacchus West portion of the property does not contain any soil contamination. A large part of the northeast quadrant of Plant One is not contaminated and a large part of the south part of Plant One is not contaminated. Approximately twenty to thirty percent of the land at Plant One and NIROP contains contamination of some kind.

35. According to an RCRA Facility Assessment performed in 1989, Plant One and NIROP have seventy-seven solid waste management units (SWMU's) that may potentially contain contamination and warrant further investigation. These units are divided into various classes based on the operations conducted at each unit. These classes include earthen sumps, buried waste sites or landfills, open burning ground, burning pads, storage units, an incinerator, open detonation areas, salvage areas, surface impoundments, sewage lagoons, spill areas, septic systems, a waste pile, the wastewater treatment plant, 90-day storage tanks, satellite accumulation stations, and a sanitary septic system.

36. Of these seventy-seven SWMU's, approximately thirty-three have had no analysis or testing done, and there is no knowledge of actual contamination on these thirty-three

sites. Forty-three sites have not had an interim corrective action plan established. Approximately twenty-two percent of the SWMU's are located on NIROP property, which is owned by the United States Navy.

37. There are twenty-two SWMU's (earthen sumps) that are now subject to an interim corrective action plan, and it is anticipated that these sites will be cleaned up during fiscal year 2003. By contrast, there are 25 SWMU's that are not proposed to have any interim corrective action plan in place before fiscal year 2006 and are not anticipated to be cleaned up until 2013.

38. Alliant has a permit to use eight of the seventy-seven sites for burning and storage of hazardous and explosive materials. This use is necessary for Alliant to conduct its business on the subject property. Alliant uses these eight sites as part of its ongoing operation and utilizes these eight sites on a regular basis. This permit is not transferable to another site, but is assignable to another owner. These eight sites will not have to be cleaned up until the business ceases its operation.

39. The permit allows storage of hazardous material for one year, instead of the normal storage period of 90 days.

40. Since the 1989 RCRA Facility Assessment came out, some interim corrective action measures have occurred on the subject property. Some of the seventy-seven sites have been cleaned up, but further administrative action is needed before such sites are closed.

41. In addition to the soil contamination, there are contaminated plumes of groundwater owned by the State of Utah that resulted from operations performed on the subject property. These plumes have begun to encroach on Barton #5 well owned by Magna Water

Company as well as several other wells owned by Kennecott Copper. There is no evidence that the groundwater contamination affects the utility of the subject property.

42. The sources of the groundwater contamination have been eliminated or controlled to prevent additional contamination of the site. Groundwater monitors have been installed to track the groundwater contamination plumes. Considerable amounts of contaminated soil have been removed from the various sumps and disposed of offsite. This all occurred prior to Alliant's acquisition of the subject property. There is no specific remediation plan for the groundwater contamination.

43. In the Form 10-K filed with the Securities and Exchange Commission for the fiscal year ended March 31, 2000, Petitioner made the following representations:

> As part of the Hercules Aerospace Company acquisition, the Company has generally assumed responsibility for environmental compliance at the aerospace facilities used by the operations acquired in the acquisition. There may also be significant environmental remediation costs associated with these aerospace facilities that will, in some cases, be funded in the first instance by the Company, subject to reimbursement or indemnification as described below. Management believes that much of the compliance and remediation cost associated with these aerospace facilities will be covered by Hercules under environmental agreements entered into in connection with the Hercules Aerospace Company acquisition. Under these environmental agreements, Hercules has agreed to indemnify the Company for:
>
> · environmental conditions relating to releases or hazardous waste activities occurring prior to the closing of the Hercules Aerospace Company acquisition,
>
> · fines relating to pre-closing environmental compliance, and
>
> · environmental claims arising out of breaches of Hercules' representations and warranties.
>
> The indemnity obligation of Hercules is subject to a total deductible of $1.0 million for all claims (including non-environmental claims) that the Company may assert under the Hercules Aerospace Company acquisition purchase agreement. In addition, Hercules is not required to indemnify the Company for any individual claims below $50,000. Hercules is obligated to indemnify the Company for the lowest cost response of remediation required at the facility. (page 18)
>
> * * * *

Contingencies – Environmental Matters

The Company is subject to various local and national laws relating to protection of the environment and is in various stages of investigation or remediation of potential, alleged, or acknowledged contamination. At March 31, 2000, the accrued liability for environmental remediation of $27.7 million represents the Company's known remediation obligations. It is expected that a significant portion of the Company's environmental costs will be reimbursed to the Company. As collection of those reimbursements is estimated to be probable, the Company has recorded a receivable of $7.8 million, representing the present value of those reimbursements at March 31, 2000. Such receivable primarily represents the expected reimbursement of costs associated with the Aerospace operations acquired from Hercules in March 1995 (Aerospace acquisition), whereby the Company generally assumed responsibility for environmental compliance at Aerospace facilities. It is expected that much of the compliance and remediation costs associated with these facilities will be reimbursable under U.S. Government contracts, and that those environmental remediation costs not covered through such contracts will be covered by Hercules under various indemnification agreements, subject to the Company having appropriately notified Hercules of issues identified prior to the expiration of the stipulated notification periods (March 2000 or March 2005, depending on site ownership). The Company has performed environmental condition evaluations and notified Hercules of its findings prior to the expiration of the March 2000 deadline. The Company's accrual for environmental remediation liabilities and the associated receivable for reimbursement thereof, have been discounted to reflect the present value of the expected future cash flows, using a discount rate, net of estimated inflation, of approximately 4.5 percent. The following is a summary of the Company's amounts recorded for environmental remediation at March 31, 2000:

	Accrued Environmental Liability (In Thousands)	Environmental Costs-Reimbursement Receivable (In Thousands)
Amounts (Payable)/Receivable.....	$(35,788)	$ 9,962
Unamortized Discount	8,133	(2,136)
Present Value of Amounts (Payable)/Receivable.....	$(27,655)	$ 7,826

At March 31, 2000, the aggregate undiscounted amounts payable for environmental remediation costs, net of expected reimbursements, are estimated to be $3.5, $5.4, $1.9, $1.7, and $1.2 million for the fiscal years ending March 31, 2001, 2002, 2004 and 2005, respectively; estimated amounts payable thereafter total $12.1 million. Amounts payable/receivable in periods beyond fiscal 2001 have been classified as non-current on the Company's March 31, 2000, balance sheet. At March 31, 2000, the estimated

> discounted range of reasonably possible costs of environmental remediation is between $27.7 and $42.7 million. The Company does not anticipate that resolution of the environmental contingencies in excess of amounts accrued, net of recoveries, will materially affect future operating results. There were no material insurance recoveries related to environmental remediations during fiscal 2000, 1999, or 1998. (pages 34 & 35)

A. RCRA Corrective Action Program Liability Adjustments

44. Petitioner has proposed a $7,000,000 decrement to the value of the land for a Resource Conservation and Recovery Act (RCRA) corrective action adjustment. Mr. Reilly did not present substantial justification or exploration for this proposed adjustment. Mr. Cook for the Respondent did not propose any such adjustment. In the prior appeal of this matter, Appeal Nos. 98-0452, 98-0608, and 99-0190, the Commission decision stated:

> "Petitioner has proposed a deduction from the RCNLD (replacement cost new less depreciation) values stipulated to by the parties to adjust for contamination which has occurred on the property. Because of the contamination, the property is subject to Resource Conservation and Recovery Act (RCRA) corrective action pursuant to a consent order between Hercules, Inc. (the former owner of the property) and the State of Utah. That consent order requires certain corrective action and contamination monitoring
>
> Petitioner has requested the deduction from RCNLD for contamination be based upon its projected monitoring costs, and page 29 of Exhibit 1 Reilly projects those monitoring costs to be $500,000 per year. Therefore, Petitioner has requested a reduction in value for monitoring costs of $8,000,000 for 1997, $7,500,000 for 1998, and $7,000,000 for 1999.
>
> The actual costs of remediation to the RCRA corrective action for the years 1997 to 1999 are as follows:
>
> | | |
> |---|---|
> | 1997: | $314,219 |
> | 1998: | $550,061 |
> | 1999: | $806,415 |
>
> Liabilities for remediation are not contained in the Bacchus Works financial statements but are booked at the corporate level and are contained in the annual reports of the year 2000 form 10-K.

The remediation and monitoring costs are included in Alliant's costs submitted to the United States Government. The costs have been considered an allowable indirect contract cost and have been reimbursed by the United States Government.

As part of the sale transaction, Alliant and Hercules, Inc. entered into an Environmental Agreement which provides for indemnification to Alliant by Hercules in the event the United States Government does not reimburse Alliant for remediation costs.

The Alliant Annual Reports to Shareholders for 1998 states that Alliant has a reimbursement receivable for environmental costs reported to be approximately $10.5 million, in which the report states it is expected that a significant portion of the company's environmental costs will be reimbursed to the company by the United States Government and those not covered through government contracts will be covered by Hercules under the indemnification agreement subject to the company notifying Hercules of claims prior to March 2000 and March 2005.

The Report to Shareholders for 1996 through 1999 and the year 2000 form 10-K contain similar representations regarding indemnification and reimbursement.

* * * *

The evidence is unclear from the record what obligations the federal government would have to continue making those reimbursements for monitoring if Alliant did not continue to own the property, particularly if there were not any government contracts for productions on the property.

It is not clear from the evidence that the Resource Conservation and Recovery Act (RCRA) corrective action consent order between Hercules, Inc., and the State of Utah runs with the land and would be binding on any future owners of the land.

Because of the reimbursement of all remediation and monitoring costs; the lack of evidence to show whether the consent order runs with the land; and the difficulty in quantifying any contamination, the Commission concludes Petitioner failed to meet its burden of proof by a preponderance of the evidence that there should be a decrement in the land values for contamination remediation and/or monitoring.

B. Stigma

45. Petitioner also proposed an adjustment to the site value for "stigma." The first adjustment for "stigma" proposed by Mr. Reilly is for the "Delay in Sale" component of environmental "stigma." The second adjustment for "stigma" proposed by Mr. Reilly is for the "Additional Financing Costs" component of environmental "stigma." The appraisal prepared by Mr.

Cook did not propose any adjustment for "stigma" to the site value.

46. Mr. Reilly proposed an adjustment to the value of the land of $3,464,000 for the "Delay in Sale" component of environmental stigma, which he represented is an adjustment of 10% for the time value of money. This proposed adjustment is presumably to allow for the additional time it would take to find a buyer for a contaminated property compared with a shorter time it would take to find a buyer for an uncontaminated property. However, Mr. Reilly did not submit any actual market studies or comparable sales data to support the appropriateness of such a "stigma" deduction.

47. Mr. Reilly also proposed a "stigma" adjustment to the uncontaminated site value in an amount of $1,872,000 for additional financing costs. Mr. Reilly represented that he contacted several mortgage bankers and some of them said they would not make a loan on contaminated property under any circumstances, while others said they would make such a loan only if they received a 100% indemnification. According to Mr. Reilly, other financing options for contaminated property would be either a public placement of funds through a bank's investment banking division, or a private placement of general corporate debt through a bank. With either of those options, the interest rate on the borrowed money would be greater than if the property were not contaminated. Therefore, according to Mr. Reilly, the higher interest rate would cause a prospective purchaser to offer a lower price on the property because a higher portion of the payment would be consumed by the higher interest rate.

48. Mr. Cook, testifying for Respondent, did not make a decrement in value to the site for the RCRA corrective action program, for the "delay in sale stigma," or for additional

financing costs stigma." Although he acknowledged there is some soil contamination to Plant One and NIROP, he maintained that Petitioner will be reimbursed by Hercules pursuant to an indemnification agreement which he originally stated "ran with the land." Upon further review, he concluded that the indemnification agreement does not "run with the land," but believes the site value should not be diminished for contamination if Hercules will ultimately indemnify Petitioner for any necessary clean-up costs.

49. Mr. Cook also testified that the groundwater contamination has been controlled to prevent further contamination, and the amount of clean-up costs are unknown and speculative because there is no present specific remediation plan for either soils or ground-waters.

50. Mr. Cook examined sales of industrial properties containing contamination located in or near Salt Lake County. He testified there are several instances of sophisticated buyers, purchasing sites with a history of contamination, and with on-going remediation and monitoring, but they would require an indemnification agreement from the seller. He further represented that such contaminated properties did not sell for a discount below fair market value if there was an indemnification agreement, and the presence of contamination did not measurably extend the marketing period. He also testified the parties did not deduct the potential remediation costs from the normal sales price.

51. Mr. Cook further stated there was another sale in Lehi which sold without a discount after the remediation had been completed.

52. When Petitioner purchased the subject property from Hercules, Chase Manhattan Bank financed the property without an interest premium for the contamination. There

was an indemnification agreement in place on that purchase. The original loan was on March 15, 1995, and it was later refinanced in November 1998 without any significant value discount or interest premium.

C. Natural Resource Damage Claim

53. On or about November 14, 2001, nearly two years after the lien date in this matter, the Utah State Department of Environmental Quality sent to Petitioner a Notice of Claim for natural resource damages "resulting from the release of hazardous substances" into the water. The total amount of the claim asserted by the state of Utah against Petitioner was $139,667,006. Based upon that claim, Mr. Reilly reduced the site value by an amount of $139,000,000 to allow for that damage claim. Because the site value was less than $139,000,000, Mr. Reilly reduced the site value to zero, and said the site had no net value.

54. Mr. Cook did not make a deduction from the site value for the Notice of Claim received from the Utah State Department of Environmental Quality. This was based upon the claim being unknown or unknowable on the lien date, his understanding that the claim was filed to prevent a statute of limitations defense by Alliant to any liability for clean-up that is ultimately determined, and the representations in the annual reports of Alliant that any required remediation costs will be significantly smaller than $139,000,000 and that any such costs will be reimbursed by Hercules.

55. Mr. Brent Eyre testified that if Mr. Reilly based his $139,000,000 deduction on that one letter, "that would be improper and would be contrary to... the IAAO standards."

56. Based upon the above, Alliant and Salt Lake County estimated the site value to be calculated as follows:

	Alliant	County
Uncontaminated Site Value:	$44,458,589	$44,660,000
RCRA Corrective Action Program Liability Adjustment:	-$7,000,000	0
Estimated Effect of "Delay In Sale" Component of Environmental Stigma.	-$3,464,000	0
Estimated Effect of "Additional Financing Costs" Component of Environmental Stigma.	-$1,872,000	0
Cost to Repair Natural Resources Damages:	-$139,000,000	0
Indicated Market Value of Bacchus Works Site:	0	$44,660,000

IMPROVEMENT VALUE

57. Both Petitioner and Respondent based the value of the improvements upon the cost approach to value. Both parties based the initial determination of value upon a study originally performed by Mr. Ed Kent from the Salt Lake County Assessor's Office several years ago, but then trended forward and depreciated by each of the parties.

58. Based upon that methodology, Mr. Reilly determined a cost approach value of $214,754,081, whereas Mr. Cook determined a cost approach value of $218,659,165. The calculation by Mr. Reilly did not include buildings #58 and #59, which had a total value of $3,433,134, so adding those buildings to the value determined by Mr. Reilly would bring the total to $218,187,215. The rest of the difference is attributable to different methods of calculating the

depreciation subsequent to the base year depreciation. Mr. Reilly used straight-line depreciation, whereas Mr. Cook used the depreciation from Marshall and Swift Valuation Services.

A. Functional Obsolescence

59. From the cost approach value determined by each of the parties, Mr. Reilly deducted $21,200,000 for functional obsolescence, whereas Mr. Cook deducted an amount of $16,400,778.

60. Mr. Reilly wrote down buildings that were not either 1) being used by Alliant either at all, or for their designed purpose, and 2) for improvements where Alliant only used part of the building, he wrote down the unused portion. Mr. Cook also wrote down buildings that were not being used, but if the building was being used for other than the intended purpose, then Mr. Cook made a deduction based on the difference in cost for the actual use compared to the cost determined by the Salt Lake County Assessor. Mr. Cook treated such facilities for purposes of functional obsolescence the way Alliant treated such facilities in its accounting records.

61. Mr. Cook identified and estimated extraordinary functional obsolescence in two ways. First, relative to functional obsolescence relating to super adequacies, improvements that are in use but no longer used for their designed purpose have been identified. The reproduction cost new of the improvement is compared to the replacement cost new for the actual use rather than the designed use. The difference in cost is then adjusted for depreciation already assessed. The result is extraordinary functional obsolescence. The second way Mr. Cook determined functional obsolescence is based on buildings that are abandoned or have no use at all. These buildings were treated similarly to Mr. Reilly's approach.

62. One hundred and sixty (160) improvements in Plant One have been written down by Mr. Cook for extraordinary functional obsolescence, twelve (12) improvements in NIROP are written down, and two improvements in Bacchus West have been written down. A total of 174 improvements are written down for extraordinary functional obsolescence, most of which are completely written off.

63. This different approach resulted in Mr. Reilly making a deduction for functional obsolescence of $21,200,000, and he depreciated to some extent 56 improvements that Mr. Cook did not depreciate.

B. Economic Obsolescence

64. The largest issue in this proceeding is whether the property of Alliant has suffered economic obsolescence, and if so, the quantification of such obsolescence. Mr. Reilly deducted economic obsolescence in an amount of $87,099,336, whereas Mr. Cook did not deduct any such obsolescence.

65. Economic obsolescence, or external obsolescence, is a loss in value due to negative influences that are external, or outside, the subject property. There are many causes of economic obsolescence, including a decrease in the demand for the product, changes in economic conditions, interest rate changes, economic recessions, and changes in governmental regulations that create additional expenses. However, the fact that those factors are present does not mean there is economic obsolescence. It is incumbent upon the appraiser to actually determine there is an economic detriment resulting from those conditions, which reduces the value below the unadjusted cost approach. It is also incumbent upon the appraiser to quantify that economic detriment. The

unadjusted cost approach represents the potential value absent any of those negative influences.

66. Mr. Jeffrey Foot, the President of the Alliant Space Group testified and presented exhibits to support the request for an economic obsolescence adjustment. He testified regarding the following matters:

a. There has been a decline in the industry demand for solid rocket motors since 1984, the year when Hercules Incorporated first appropriated funds for the construction of Bacchus West.

b. There has also been a decline in the industry demand for solid rocket motors since 1990, the year when Hercules Incorporated completed the initial construction.

c. The decline in demand for solid rocket motors has resulted in unused capacity at the Bacchus Works facility.

d. There has been a staffing reduction from approximately 3,900 in 1989 to approximately 1,700 in 2000. (The Commission notes that in 1995, the year that Alliant purchased the Bacchus West facility, the staff was only slightly more than 1,700.)

e. In "then-year dollars," the solid rocket motor market has declined from $2.5 billion in 1991 to $1.1 billion in 2000.

f. Alliant estimates the propellant production at the Bacchus Works will decline from 1990 to 2002. However, the actual production for 2000, the year at issue, is significantly higher than for either 1990 or 1995. Petitioner claims it has the capacity to produce slightly less than 20 million pounds of propellant per year, and in 2000 it produced slightly less than 10 million pounds.

g. For most of the motor and solid rocket fuel manufactured by Petitioner, it has orders to "buy" more than it is ultimately able to deliver. That is because it regularly receives slowdown notification orders from its initial baseline contracts.

67. Petitioner used the declines in production to attempt to establish the existence of economic obsolescence.

68. Mr. Reilly attempted to measure economic obsolescence by comparing (1) historical Bacchus Works' results of operations vs. current results of operation; (2) Bacchus Works' capital appropriation requests vs. actual financial performance; (3) projected Bacchus Works' financial performance vs. actual financial performance; and (4) industry demand analysis. Mr. Reilly eliminated two additional measures of economic obsolescence which he had included in his 1997 to 1999 appraisal. Those two are the required Bacchus Works' cost of capital vs. actual return on invested capital; and, projected Bacchus Works' internal rate of return vs. actual rate of return.

69. Petitioner argues that to properly consider the economic obsolescence issue, it is important to differentiate whether the cost approach has been based upon "reproduction costs" or "replacement costs." In its proposed findings of fact, conclusions of law and final decision submitted by Petitioner, the issue was presented as follows:

> Mr. Cook's appraisal labels the preliminary cost value as "reproduction/replacement costs." However, neither Mr. Cook's direct testimony, nor his appraisal attempts to identify the difference between the two types of costs. This is not of serious concern to the County Board. Mr. Cook's oral testimony at the Formal Hearing paid little attention to the issue, though Mr. Cook did claim the "Kent numbers" from "1978 and earlier are replacement cost numbers. For – subsequent to 1978 or from 1979 and beyond, they are reproduction cost numbers." Mr. Cook claimed 38% of the "Kent numbers" are "replacement," and 62% are "reproduction costs." Test. of Philip Cook, Tr., 449-450.

For ATK, "the case turns on the definition of economic obsolescence: The diminution in value to the *original investment,* the original investment for *the reproduction costs which form the basis of the assessment."* Opening Stat. of Maxwell Miller, Tr. 10 (emphasis added). Accordingly, ATK stresses the preliminary cost values are reproduction costs. Mr. Reilly testified, "I have relied upon the reproduction costs new which Mr. Ed Kent of the County originally prepared and which the County has factored forward every year since Ed Kent's valuation." Reilly Dir. Test., 4, ln. 3-4. Mr. Reilly further explained, "Then what Mr. Kent does is take the '78 costs, *trends them up to 1995,* takes '79 and after costs and *trends them up to 1995,* and Mr. Cook and I go from there. So for every asset purchased in 1979 and after, it's clearly a reproduction cost...[F]or every asset in place as of 1979, by 1/1/00 *these costs have been trended up, and these costs have been trended up so 100 percent of these costs are reproduction costs, meaning trended up costs..."* Test. of Robert Reilly, Tr., 706-707(emphasis added).

Mr. Michael Remsha, an appraiser with American Appraisal Associates who submitted a Review Appraisal of Mr. Cook's appraisal, likewise testified that Mr. Cook and Mr. Reilly both used reproduction costs, and not replacement costs as a starting point. He testified the difference between the two costs is significant, and can, as a practical matter, make an enormous difference in assessed values. "Replacement cost is the cost as of the appraisal date of a property that has the same utility and capacity of the subject property but represents current or modern technology," whereas "Reproduction cost is the cost of what is being appraised that represents exactly what is currently there as of the appraisal date, including all of its inefficiencies and negative attributes." Test. of Michael Remsha, Tr., 268.

Neither Mr. Cook's direct testimony, nor his oral testimony, nor his appraisal report acknowledge any awareness of a *significant difference* between replacement
and reproduction costs. Likewise, neither the County's Opening Statement nor Closing Argument mentions the issue. Mr. Cooks' appraisal report acknowledges the "source data" available to George Christopolous that are

the preliminary cost values "were developed by Ed Kent" and "based on original costs." Cook App. Exhibit R-Cook 1, 76. However, Mr. Cook labels the "reproduction/replacement" costs as though such were an undefined and indistinguishable lump.

Contrary to Mr. Cook, ATK repeatedly stresses the distinction between reproduction and replacement costs. Mr. Remsha testified the replacement cost would be "much smaller, much different" for the Bacchus Works, because "such costs would have the same utility but would incorporate modern technology as of the appraisal date." Test. of Michael Remsha, Tr., 269 Mr. Reilly testified he would use "exactly the methodology Mr. Cook

> used" for measuring economic obsolescence "if we were doing a replacement cost analysis. If we were looking at today's cost, you would want to look at today's structures." Test. of Robert Reilly, Tr., 711. Mr. Miller argued that "Robert Reilly's methodology [for measuring economic obsolescence] is only applied to reproduction costs," and "the reason why in a nutshell there's obsolescence is because the reproduction costs are $200 million. No sane person would build an overcapacity facility." ATK Opening Statement, Tr., 9, ln. 13. Mr. Reilly testified, "for every asset purchased in 1979 and after, it's clearly a reproduction cost." Test. of Robert Reilly, Tr. 706, ln. 23.

70. Mr. Reilly testified that this distinction between reproduction cost and replacement cost is very significant. It is his position that economic obsolescence must be measured by an income shortfall approach, and what is being measured is the difference in the income being earned by the property on the lien date versus the income the property was intended to earn. Therefore, he argues we must determine the economic obsolescence from the reproduction cost new by going back to the base period when those costs were incurred. Accordingly, his position is that reproduction costs of the property at issue in 1984 through 1990, determine the costs for the benchmark base period which must be used. His position is that economic obsolescence is defined as a decrease in value from a time when there was little or no economic obsolescence to the current time.

71. Mr. Reilly also argues that the methodology used by Mr. Cook is erroneous because he is measuring only the difference between two assumed numbers. As an example, Mr. Reilly notes that Mr. Cook's estimate of an 18.41% rate of return for Alliant and the 16.00% required rate of return are both assumptions. Mr. Reilly further argues that this ignores the economic obsolescence that is imbedded in the historical costs, i.e. the reproduction costs, which is the cost used by Mr. Kent in his original study and which was relied upon by both parties.

72. The position of Mr. Cook is very different from that of Mr. Reilly. Mr. Cook did not believe it is necessary to compare the production of Petitioner with any base line time period. Instead, his approach is to determine if the property is earning an adequate return, and if not then there is economic obsolescence. If the property is earning an adequate return, then Mr. Cook maintains there is no economic obsolescence. Mr. Cook's method of determining and measuring economic obsolescence was obtained from a Mr. Don Drysdale[1], and is described in his prepared testimony as follows:

> "The excess earnings method is applied as follows:
> - Estimate the fair market values of the net tangible assets.
> - Estimate a normalized level of earnings.
> - Estimate the required rate of return of the tangible assets.
> - Estimate the required return on net tangible assets by multiplying the required rate of return on the tangible assets by the net tangible assets.
> - Subtract the required return on net tangible assets by the normalized level of earning to determine excess earnings. If the result is a positive number, there are excess earnings. If the result is a negative number, there are not excess earnings.
> - Estimate an appropriate capitalization rate to apply to the excess earnings.
> - Divide the excess earnings by the capitalization rate to determine capitalized excess earnings (intangibles).
> - Add the fair market value of the tangible assets to the capitalized excess earnings. This results in the value of the subject company.
> - Apply discounts and premiums as appropriate."
>
> "Note: The blended capitalization rate (the required return on tangible assets and the excess earnings capitalization rate) should approximate the weighted average cost of capital." [2]

73. Mr. Cook then utilized that methodology and determined that the net tangible assets are producing an adequate return, and therefore, in his opinion, there is no economic

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1 Drysdale, Don M., CPA, "Common Approaches to Business Valuation," *Fundamental issues in Utah Business Valuations* (Eau Claire, Wisconsin: NBI< Inc., 1998): 56-57.

2 Update appraisal of Mr. J. Philip Cook, Exhibit 2 of Respondent, page 97.

obsolescence which has occurred.

APPLICABLE LAW

1. The Tax Commission is required to oversee the just administration of property taxes to ensure that property is valued for tax purposes according to fair market value. Utah Code Ann. §59-1-210(7).

2. To prevail, the Petitioner must (1) demonstrate that the County's original assessment contained error, and (2) provide the Commission with a sound evidentiary basis for reducing the original valuation to the amount proposed by Petitioner. *Nelson v. Bd. Of Equalization of Salt Lake County*, 943 P.2d 1354 (Utah 1997). However, in this case, neither party presented evidence to support the determination of value made by the Salt Lake County Board of Equalization. Accordingly, each party has an equal burden of proof to provide the Commission with a sound evidentiary basis, by a preponderance of the evidence, to establish the fair market value of the property.

3. A tax is imposed on the possession or other beneficial use enjoyed by any person on any real or personal property which for any reason is exempt from taxation, if that property is used in connection with a business conducted for profit. This includes property which is owned by the United States Government but used in connection with a business conducted for profit. Utah Code Ann.§59-4-101.

DISCUSSION

NIROP

As stated above, legal counsel for Petitioner suggested:

> With respect to NIROP action, Alliant submits the Tax Commission

> cannot simultaneously adjudicate the NIROP issues in Alliant's pending 2000 assessment case and participate as a Defendant-Intervenor in the NIROP action, without violating Alliant's constitutional due process rights. Simultaneous participation in such incompatible roles may trigger an action against the Tax Commission. To avoid this problem, Alliant recommends that the Tax Commission, as a matter of comity, abstain from deciding the NIROP issues in Alliant's 2000 valuation case pending before the Commission.

Notwithstanding the arguments of Petitioner, the Commission believes it has a constitutional and statutory responsibility, pursuant to Article 13 of the Utah Constitution, and Utah Code Ann. §59-1-210, to interpret the tax laws of the state of Utah, including the exemption provisions and the interpretation of the privilege tax provisions of Title 59, Chapter 4. Such a review should be prior to the matters being presented to a court for interpretation. However, Petitioner chose to bring an independent action in the District Court, thereby bypassing the Tax Commission on an issue the Commission believes is its initial prerogative pursuant to the Constitution and statutes of the state of Utah. Therefore, in the opinion of the Commission, it had a responsibility to intervene in the separate NIROP action in District Court to preserve what it believes is its constitutional and statutory responsibility. In the view of the Commission, it was improper for the matters to be presented to the court prior to the time there had been a ruling on those issues by the Commission. The Commission therefore intervened in the District Court NIROP action, not to take a position on any valuation or exemption issues before the Court, but to preserve the constitutional and statutory process of having tax matters presented to the Tax Commission prior to those matters being presented to the Court for judicial determination.

Once that decision has been made by the Commission, the decision may be reviewed by the appropriate judicial process. In this proceeding, the NIROP issue is one which is clearly

within the jurisdiction of the Tax Commission. This NIROP issue was presented and argued to the Commission, evidence was adduced, and if the Commission does not decide that issue in this Order, then there is no other body with original jurisdiction to hear and decide it.

When reviewing the evidence relating to whether the NIROP property is exempt from the privilege tax, the Commission determines that there is no evidence which was presented which persuades the Commission that the NIROP property is exempt from the privilege tax in the state of Utah. Petitioner has the exclusive possession and enjoys the beneficial use of the NIROP facilities in connection with its business being conducted for profit. In so holding, the Commission acknowledges that the Navy, as landlord of the facility, still retains rights to access the facility. The Commission also recognizes that Lockheed-Martin, as the general contractor, still has a presence at the facility at the direction of the United States Navy. However, this is not unlike Thiokol Chemical Corporation v. Peterson, 15 Utah 2d 355, 393 P. 2d 391 (1964 Utah) in which the Supreme Court of Utah stated:

> The test which has been applied in ascertaining whether a tax offends against this federal immunity has been referred to as the "legal incident" test. It is stated that if the tax is directly upon the United States or an agency thereof, it is invalid. But the converse is also true: If the tax falls upon another, the fact that the tax might indirectly fall upon the United States does not render it invalid. It could hardly be otherwise.
>
> * * * *
>
> The contract with which we are concerned is written in broad terms. The import of its provisions is to require of Thiokol to produce the end results, and it does not specify in detail how the research and development shall be conducted. There is nothing to suggest that the Government presumes to enter into such problems, nor into the policy making or the management of plaintiff's operation of this military production plant. Consistent with the conclusion that it was the understanding of the parties that Thiokol was looked to only for the end result is the testimony of the Air Force Contract Administrator:

> "Q. And did the contract specify exactly how that research and development would be conducted?
>
> "A. No, sir, these contracts are in very broad terms.
>
> "Q. Specifying the end that was desired, rather than the means by which the end would be achieved?
>
> "A. That is correct, sir."
>
> The above conclusion is not changed by the fact that under the contract the Government maintains a staff of about 60 people to supervise such things as security, safety measures, labor relations, accounting, procurement and the Company's organization structure, including wages and salaries. These measures are quite understandable because of the desirability of safeguarding the interests of the Government in the expenditure of such large sums of Government money; and more importantly, because of the necessity for maximum security in this field vital to the national defense. But they are not inconsistent with the main purport of the contract which is directioned toward requiring Thiokol to pursue its own course in accomplishing "the end result," rather than the Government having actual management and direction of the enterprise.
>
> Fitting into that same general character is the provision of the contract with respect to the property in question. Even though it recites that the Government retains title, it appears to be intended that Thiokol will deal with it practically as it chooses. It has the right to inspect and reject any property found unsuitable to its uses. Upon acceptance it has the duty to maintain, but no liability for loss, damage or the using it up entirely. Thiokol is given the right to possession and to use it *primarily* in conjunction with the contract. This seems to imply that it could use the property for other purposes if it so desires. The foregoing leads us to agree with the
> conclusion of the trial court that under the facts shown and the terms of the contract, Thiokol is not properly regarded as an instrumentality of the United States Government, but as an independent contractor.

Therefore, in accordance with the evidence in this case, and with the previous decisions of the Commission and, based upon the rule of law established in the Thiokol case, the Commission determines that the NIROP property is subject to, and not exempt from the privilege tax

imposed by Utah Code Ann. §59-4-101, et. seq.

LAND VALUE

The parties made estimates of the land value, without contamination, which were extremely close. Both parties acknowledged that the difference is not significant or material, and is less than $100 per acre. Therefore, based upon the testimony of the appraisers, the Commission determines a reasonable land value, prior to any adjustments for environmental issues, is $44,600,000.

A. Environmental Contamination

Mr. Reilly proposed reductions in the land value for environmental contamination. Those reductions were for Resource Conservation and Recovery Act (RCRA) corrective action monitoring, and environmental stigma caused by both the delay in sale and additional financing costs because of the environmental contamination.

Mr. Cook examined several sales of industrial properties and represented that, in his opinion, an adjustment for contamination was not necessary because the market did not reflect a reduction in value for contamination if the selling party provided an indemnification agreement to the purchasing party. Therefore, Mr. Cook recommended that no reduction in value be made for contamination because it is not reflected in the market place.

The Commission has considered that reasoning of Mr. Cook, but determines that if it is necessary for the selling party to give an indemnification agreement, then there are potential costs to the seller associated with fulfilling the terms of any such indemnification agreement. The nominal purchase price must be reduced by such costs to arrive at fair market value. In other words, expert

testimony established that the indemnification agreement does not run with the land. Therefore, we must attempt to determine the price at which this property would sell to a willing buyer without an indemnification agreement. Therefore, the Commission determines that appropriate adjustments must be made for any contamination which exists to the land.

B. RCRA Corrective Action Program Liability Adjustments

Mr. Reilly recommended an adjustment to the value of the land for the monitoring costs averaging approximately $500,000 per year which are paid to comply with the Resource Conservation and Recovery Act. The Commission's understanding is that there are 13 years remaining including the year 2000, which would be a total cost of $6,500,000. Because that amount will not all be paid out immediately, and will instead be paid out over the next 13 years, the Commission determines it is appropriate to reduce that amount to a present value using a discount rate of 10% per annum, the same discount rate proposed by Mr. Reilly in other adjustments. Therefore, the Commission determines it is appropriate to reduce the value of the land by $3,550,000, which is the present value of $500,000 per year for 13 years, rounded to the nearest $10,000.

C. Stigma

Mr. Reilly proposed an adjustment to the value of the land of $3,464,000 for the "delay in sale" component of environmental stigma, and an additional $1,872,000 for the "financing costs" component of environmental stigma. With respect to both of these adjustments, Respondent did not present substantial challenge to those adjustments except that it did not observe such a stigma in the sales which had occurred.

If it is necessary to provide an indemnification agreement, then it is likely that such stigma exists. As noted above, we must attempt to determine value without regard to any potential indemnification agreement. The Commission therefore approves those adjustments as proposed by Mr. Reilly.

D. Cost to Repair Natural Resources Damages

Based upon the letter received from the Utah State Department of Environmental Quality in November of 2001, Mr. Reilly recommended an adjustment to the site value of $139,000,000 to allow for that damage claim, which reduced the value of the land to "nil". There was testimony that the primary reason the Department of Environmental Quality presented that damage claim was to prevent the statute of limitations from running, and does not provide definitive evidence of the specific amount for the damage to those resources.

Also, the claim was made nearly two years after the lien date in this proceeding. In view of the circumstances here, the Commission determines that the amount of the claim is speculative and does not establish the amount of contamination as of the lien date. Further, if the amount is actually spent, or if the damages are corrected by spending any amounts necessary, then the amounts of the claim would be duplicative of the amounts in the RCRA corrective action adjustment and the "stigma" adjustments, i.e., if the problem is corrected by the payment of such damages, then no further monitoring would be needed and the property would no longer have the "stigma" of contamination.

In addition, to the extent that the damages were known or knowable on the lien date, the Commission determines those damages to be included in the contamination adjustments

approved herein by the Commission. To the extent that any such damage claim exceeds those amounts, the Commission believes that such damages were not known or knowable on the lien date, and therefore it is not appropriate to make an adjustment for such damages which were not known or knowable. This interpretation is consistent with representations made by the management of Alliant to the Securities and Exchange Commission and the public in the Form 10-K for the fiscal year ended March 31, 2000. It is also consistent with the fact that large portions of the entire tract are not contaminated land and could be sold separately.

IMPROVEMENT VALUE

Mr. Reilly determined a cost approach value of $214,754,081, whereas Mr. Cook determined a cost approach value of $218,659,165. After consideration of the two buildings omitted by Mr. Reilly, the values are very close.

Although the resulting difference is not of major significance, for purposes of this decision, the Commission will accept the determination of value made by Mr. Cook of $218,659,165. The Commission has made this choice because Marshall and Swift make an attempt to base its depreciation calculations upon the market place, whereas straight-line depreciation is primarily an accounting procedure for spreading the costs over an equal number of periods.

A. Functional Obsolescence

Mr. Reilly determined the property suffered "functional obsolescence" in an amount of $21,200,000. Mr. Cook determined the property suffered "excessive functional obsolescence in an amount of $16,400,778.

Both Mr. Reilly and Mr. Cook used, to some extent, similar methods in determining

which buildings suffered from functional obsolescence, by examining each of the buildings on the facilities of Petitioner. Mr. Reilly wrote down the full value of buildings that were either not being used by Alliant or were not being used for the designed purpose, and he also wrote down the unused portions of buildings that were being partially used. Mr. Cook wrote down the full value of buildings that were abandoned or unused, and he also wrote down only a portion of the buildings that were underutilized.

Based upon the testimony of Mr. Reilly and Mr. Cook, the parties did not believe that the difference in functional obsolescence was significant or material. Mr. Cook did not eliminate the full value of buildings which were underutilized. The Commission finds that buildings may be underutilized without being functionally obsolete. Therefore, the Commission finds there was functional obsolescence of $16,400,778, as determined by Mr. Cook.

B. Economic Obsolescence

Mr. Reilly proposed economic obsolescence in an amount of $87,099,336. Mr. Cook determined that there was no economic obsolescence to be deducted from the RCNLD value of the property.

Mr. Reilly used substantially the same methodology he used in the earlier proceedings before this Commission, relying on a base period or bench mark of 1984 through 1990 from which to measure economic obsolescence. He measured economic obsolescence at the Bacchus Works by comparing (1) Historical Bacchus Works results of operations vs. current results of operations: (2) Bacchus Works Appropriation requests vs. actual financial performance: (3) Projected Bacchus Works financial performance vs. actual performance: and (4) Industry demand analysis.

Mr. Cook attempted to determine whether there was economic obsolescence by estimating the return earned by the assets and comparing it with his estimated rate of return the assets should be earning. When Mr. Cook determined that in his opinion the assets were earning an income greater than was required, he determined there was no economic obsolescence.

One of the problems in trying to determine economic obsolescence is that the subject property is a unique special service facility for which some traditional methods of determining economic obsolescence are not applicable. In addition, most of the available financial statements are for the company as a whole, which includes other facilities besides the property at issue in this proceeding. Therefore, the income figures are primarily business income earned by the entire company and not just by this property. Although the underlying premises and hypothesis for both of the appraisers appear to be reasonable on the surface, the Commission has concerns about the application of those hypotheses.

With respect to Mr. Reilly's determination, he relied to a large extent upon averages, and in doing so any single discrete point can have an abnormal quantitative impact on those averages, causing exaggerations or skewings of otherwise normalized measurements. This is most certainly the case in his use of "financial measures" under the "historical results of operations versus current results of operations." (Exhibit IV-1). In that case, the 1984 return of 170% was so high that it resulted in a seven-year average which was higher than five out of the seven years. Therefore, the use of an average in that case significantly distorted the economic obsolescence determined by Mr. Reilly. Mr. Reilly did testify that averaging removes the subjective appraisal judgment, but the Commission believes that the exercise of judgment is not only appropriate, but is essential to the

appraisal process. Without the application of such judgment, we are left with only simple averages which may or may not represent actual obsolescence.

With respect to Mr. Cook's determination, although he attempted to apply his judgment in determining economic obsolescence, it leaves a question as to whether it is possible to generate sufficient business earnings from the total enterprise, which then overlooks real economic obsolescence in the underlying tangible real property. This may well be the case in this matter, because it is clear the overall space market economy has declined, while the company appears to be earning an adequate return. Nevertheless, the physical assets as they exist are not completely necessary to produce this return, i.e., the company could perhaps make a lower investment and still meet its production requirements. In addition, from a review of Mr. Cook's analysis, it could be concluded that no obsolescence exists at all, i.e., if functional obsolescence is added back into the depreciated cost figure, there is only a minimal impact on the residual income. (Especially in light of the fact that most of the primary buildings were not critically examined for functional obsolescence.)

Further, while Mr. Cook's techniques appear reasonable, there is a concern about the specific rates of return used by him, specifically based upon the critique of Mr. Remsha. Also, the rates may not take into account the level of risk associated with a business as volatile as the space industry.

One additional factor is that both Mr. Reilly and Mr. Cook have attempted to make one calculation for functional obsolescence and another calculation for economic obsolescence. In reality, a substantial part of what has been classified as functional obsolescence may be either in full or in part economic obsolescence. When Mr. Reilly and Mr. Cook classified unused and/or underutilized buildings as functionally obsolete, it is possible that the buildings were unused or

underutilized because of the declines of business in the industry and in particular the declines of the business of Petitioner. There was no evidence presented by either party to indicate those buildings would not or could not still be in use if the production levels were at the levels that were anticipated when the facility was built or when Petitioner acquired the property. Therefore, it is possible that part of the obsolescence that was caused by economic conditions has been classified as functional obsolescence. Accordingly, if an additional deduction is made for economic obsolescence, the value of the property may be reduced below fair market value.

In this matter, the data clearly show that the economic performance of both the overall industry and Petitioner itself peaked in the early 1990's, and then experienced significant declines during the mid 1990's, but then increased in the late 1990's. As of 1999, various indicators remain below peak period levels, but are equal to performance levels in approximately 1989, or the base period used by Mr. Reilly. The conclusion of this information is that it is possible that economic obsolescence may exist, but if it does exist, it is in an amount significantly less than that determined by Mr. Reilly.

In this case, the Commission is faced with testimony of two experts, one of whom asserts $87,099,336 of economic obsolescence and one of whom asserts no economic obsolescence. We do not believe that any methodology has been presented that would allow it to apply its own appraisal judgment to come up with an intermediate number. Accordingly, we believe we must choose the adjustment of whichever expert most closely approximates the amount of economic obsolescence that may be present.

We accept Petitioner's assertion that no reasonable person would build, on the lien

date, the Alliant facility in the same way or with the same capacity as originally designed. The question before us, however, is not whether the original costs were justified. The question is whether additional reductions are appropriate given the substantial physical depreciation, functional obsolescence and environmental reductions already allowed.

In light of these facts, the Commission believes and finds that the determination of economic obsolescence made by Mr. Reilly is significantly exaggerated, and the determination of Mr. Cook of no economic obsolescence beyond the functional obsolescence and physical depreciation allowed more closely reflects fair market value. Therefore, the Commission is not persuaded that any additional adjustment is necessary to reflect economic obsolescence.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission finds that the market value of the subject property as of January 1, 2000, is $238,032,387, as calculated on Exhibit A attached hereto. The County Auditor is ordered to adjust the assessment records as appropriate in compliance with this order.

DATED this 16th day of July, 2003.

G. Blaine Davis, Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this 16th day of July, 2003.

Pam Hendrickson
Commission Chair

STATE TAX COMMISSION SEAL STATE OF UTAH

Palmer DePaulis
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-601 and 63-46b-13 et. seq.
GBD/ckl/01-0974.fof

Appeal No. 01-0974

EXHIBIT A

VALUE DETERMINED BY THE COMMISSION

Uncontaminated Site Value:	$ 44,660,000
RCRA Corrective Action Program Liability Adjustment:	$ 3,550,000
Estimated Effect of "Delay In Sale" Component of Environmental Stigma:	$ 3,464,000
Estimated Effect of "Additional Financing" Component of Environmental Stigma:	$ 1,872,000
Cost to Repair Natural Resource Damages:	$ 0
Indicated Market Value of Bacchus Works Site:	$ 35,774,000
RCNLD:	$218,659,165
Functional Obsolescence:	$ 16,400,778
Economic Obsolescence:	$ 0
Total Value of Bacchus Real Estate Improvements:	$202,258,387
Total Value of the Bacchus Works Real Property (rounded):	$238,032,387

Concurring Opinion

I concur in the opinion of the majority but wish to make an additional point on economic obsolescence. Mr. Reilly's approach is creative and flexible. Such an approach may be necessary for an aging special use facility in many cases. In my view, however, his approach is both unnecessary and unwarranted in this case. The existence and amount of economic obsolescence can be ascertained by reviewing the most significant economic event in the recent life of this property, namely, its purchase by Alliant a few years before the lien date.

In pro forma financial statements provided to shareholders at the time of the acquisition, Alliant represented to shareholders that the value of the acquired assets would be based on their respective fair market values as supported by appraisals. [SL 004368.] Beginning with a book value for Hercules' net property, plant and equipment of $278,459,000, Alliant then increased that value by $189,128,000 to "[r]eflect[] the adjustment of property, plant and equipment to fair value . . ." [SL 004373, 004377.] At the same time, Hercules' booked goodwill was written off [SL004377 (n. 20)] and a $40,000,000 adjustment was made to "reflect the adjustment of unfavorable purchased contracts to their fair market value." [SL 004378 (n. 23).] These entries would not indicate any incremental economic obsolescence as of the purchase date unless the original cost figures on Hercules books are substantially lower than the stipulated cost figures used by the parties as a starting point for their appraisals.

Apparently, at some subsequent time, an adjustment to goodwill was made to reflect the fact that the purchase price exceeded the fair market value of tangible assets. Alliant's 1990 financial statement reflects goodwill from acquisitions of $125,000,000.

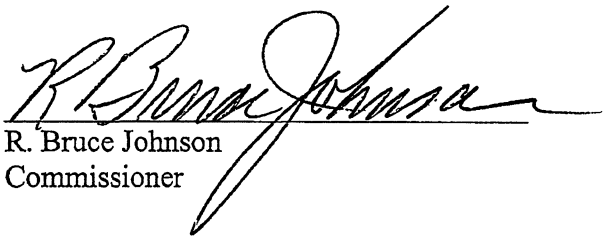
This adjustment, of course, to the extent it relates to the Hercules acquisition, supports Alliant's contention that it was acquiring significant intangibles as part of the purchase.

Alliant essentially argues that the issue on economic obsolescence is whether any reasonable person would make the same investment decisions Hercules made from 1980 through 1990, if they knew what the state of the industry would be as of the lien date. That question, however, ignores the arm's length purchase of this property by Alliant at a point in time much closer to the lien date and after most of the market disruptions had occurred that allegedly gave rise to economic obsolescence. "In assessment litigation, under the 'rules of evidence' a bona fide sale of the subject property is considered the best evidence of market value." *Property Appraisal and Assessment Administration*, p. 153, International Association of Appraisal Officers (1990 ed.). The values recorded by Alliant on its books, and reported to its shareholders, its lenders, and the Securities and Exchange Commission, would be far more persuasive evidence of the existence and amount of economic obsolescence than the analyses prepared solely for purposes of this proceeding.

Alliant criticizes Mr. Cook's allocation of the purchase price, but it makes no effort to provide its own allocation. Mr. Cook does not rely on his own allocation. Thus, the Commission is left without definitive analysis by either party on a critical issue. Without guidance from knowledgeable witnesses, we are unwilling and unable to parse the financial statements ourselves. I am prepared to assume, however, that Alliant devoted significant resources to ensuring that its financial statements accurately reflect its financial position. The Hercules acquisition was given great attention in the SEC filings and was obviously material. Alliant has not presented evidence or testimony that the

purchase price allocated on its books and reported to its shareholders in 1995, or in subsequent adjustments, was substantially lower than the values asserted by the County. Thus, I can only conclude that the relevant entries on Alliant's own books and records would not support Mr. Reilly's calculations. (I find no evidence of any factors that would support a finding of material economic obsolescence arising after the purchase date.)

For this reason, in addition to the arguments adopted in the majority opinion, I find that no additional allowance is justified for economic obsolescence.



R. Bruce Johnson
Commissioner

CONCURRING OPINION

A potential buyer for this property, as it exists on the lien date, would find improvements that suffer from wear and tear (physical deterioration) and to some extent, are either unused or underutilized (functional obsolescence). The question is whether, after adjusting for these types of depreciation, there would be an incremental loss in value from external forces.

The record clearly shows, as noted in the majority opinion, that the space industry has been in decline since a peak during the early 1990's, bottoming in the mid 1990's, and beginning to recover in the late 1990's. The record is also clear that on the whole, current industry performance is only now reaching its prior levels, but has not been able to perform at levels of even nominal growth that might have been expected based on market and economic conditions for the industry in the late 1980's and early 1990's. This same pattern holds true for Alliant.

The evidence, on the whole, suggests to me that economic obsolescence is embedded in the structures, as they exist on the lien date. I am persuaded the Petitioner is correct in its general assertion that historic performance can be compared with current performance to properly analyze whether reproduction costs should be reduced by economic obsolescence. Two expert appraisers advocate this general position. Although experts testifying for the Respondent stated that they were not aware of that premise, they did nothing to refute it. Nonetheless, I am also persuaded that Petitioner's specific techniques exaggerated the amount of obsolescence.

Respondent's analysis, at worst, was conservative in estimating risk associated with required rates of return. However, as stated in the majority opinion, there is no reason to believe a going concern or business enterprise cannot earn an adequate, or even a high return, even though some of its assets are economically obsolete. I note, however, there is no reason for an acknowledged expert to use techniques that he does not advocate.

Neither party provided an acceptable alternative; Petitioner's techniques were exaggerated or overly selective while Respondent, in my opinion, did not go far enough in analyzing overall performance for the company and the industry. I am left, however, believing that economic obsolescence exists, could have been measured, is far less than Petitioner's estimate, and perhaps slightly more than Respondent's. Examining what I feel to be some critical numbers, taken from Petitioner's data, reveals the following:

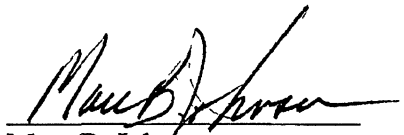
Category	Peak Year	Amount (000's)	1999	% Change	Avg./Yr.
Total Sales	1990	527,300	434,495	-18%	-2%
Operating Profit	1986	94,975	81,712	-14%	-1%
EBITDA	1989	89,045	102,023	15%	2%

Although EBITDA (Earnings Before Interest Taxes Depreciation and Amortization) is the most relevant of the categories listed, it has only increased at a modest rate, and most, if not all, of the increase can be attributed to a significant decrease in administrative expenses, not to economic growth. In fact those cost decreases result from reduced production relative to designed capacity, which in turn is the basis for possible economic obsolescence.

Given these factors and the nature of the reproduction cost, I can only conclude that there is a loss in value to the subject property, resulting from an industry decline in the missile sector, in spite of a partial recovery via the commercial space launch sector in the past few years.

Unfortunately, neither party provided an approach with which I am completely comfortable. Nor should I impose my own methodology. I rely on the basic numbers only to indicate obsolescence, not to measure it. At best, I believe these, and other financial and economic data could be used in an alternative appraisal methodology to measure obsolescence, or possibly as a way to approximate a true measure of obsolescence.

Under special circumstances in the past, the Commission has incorporated it's own judgment and made adjustments to a party's evidence. However, given the complexities of the present case and the disparity between two acknowledged experts, doing so here would not be appropriate.



Marc B. Johnson
Commissioner

Utah State Tax Commission

USTC - Appeal

Certificate of Mailing

Alliant Techsystems Inc vs Salt Lake County BOE 01-0974

Alliant Techsystems Inc Petitioner

Robert N Berg
600 Second Street NE
Hopkins, MN 55343

BILL THOMAS PETERS
ATTORNEY FOR COUNTY(S)
111 E BROADWAY STE 1100
SALT LAKE CITY UT 84111

Attorney for Respondent

Craig B. Sorensen Respondent

Salt Lake County Auditor
2001 South State N3300
Salt Lake City, UT 84190

Karl Hendrickson Respondent

Salt Lake County Attorney
2001 South State S3600
Salt Lake City, UT 84190

**** *CERTIFICATION* ****

I hereby certify that I mailed a copy of the foregoing document addressed to each of the above named parties.

7/15/03
Date

Carolyn Lacker
Signature

Certificate of Mailing

Alliant Techsystems Inc vs Salt Lake County BOE **01-0974**

Lee A. Gardner Respondent

Salt Lake County Assessor
2001 South State N2300
Salt Lake City, UT 84190

Mary Ellen Sloane Attorney for Respondent

Salt Lake County Attorney
2001 South State S3600
Salt Lake City, UT 84190

Maxwell Miller Attorney for Petitioner

201 South Main, Ste. 1800
P.O. Box 45898
Salt Lake City, UT 84147

**** *CERTIFICATION* ****

I hereby certify that I mailed a copy of the foregoing document addressed to each of the above named parties.

7/15/03
Date

Carolyn Lepore
Signature

ADDENDUM C – Facilities Use Contract

SPN-62/SPLe:DRB/nb

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE	OF PAGES
U	1	2

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
P00001	See Block 16C	MR 396QSPN50	N/A

6. ISSUED BY	CODE	7. ADMINISTERED BY (If other than Item 6)	CODE
STRATEGIC SYSTEMS PROGRAMS	N00030	DCMAO, Denver	S0602A
931 Jefferson Davis Hwy		Orchard Place 2	ADP Point:
Arlington, VA 22202-3518		5975 Greenwood Plaza Blvd.	S2603A
Buyer/Symbol: T.Heilig/SPN-62		Suite 200	
Phone: (703) 607-0910 Autovon: 327-0910		Englewood, CO 80111-4715	

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)	(X)	9A. AMENDMENT OF SOLICITATION NO.
Alliant Techsystems, Inc. Bacchus Works P.O. Box 98 Magna, UT 84044-0098		9B. DATED (SEE ITEM 11)
	X	10A. MODIFICATION OF CONTRACT/ORDER NO. N00030-96-E-0068
		10B. DATED (SEE ITEM 13) 8 Aug 1996

CODE 3761 FACILITY CODE 10396

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ This above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended ☐ is not extended.
Offers must acknowledge receipt of this amendment prior to the hour specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted such changes may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

NO FUNDS INVOLVED

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

☐ B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).

☐ C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:

X The "Changes-Cost Reimbursement" clause and the mutual agreement of the parties.

☐ D. OTHER (Specify type of modification and authority).

E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return 6 copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

See Next Page

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)	16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)
H. L. Aure Vice President, Navy Programs	
15B. CONTRACTOR/OFFEROR (Signature of person authorized to sign)	15C. DATE SIGNED 10/24/96
16B. UNITED STATES OF AMERICA BY (Signature of Contracting Officer)	16C. DATE SIGNED

General Intent:

The purpose of this modification is to add a Section H provision concerning siting of facilities. This modification results in no change in the estimated cost of the contract. This modification represents a full and equitable adjustment for the change identified herein. The Contractor hereby releases the Government from any and all liability for further equitable adjustment attributable to such change.

Modification:

Section H, Special Contract Requirements: At the end thereof ADD:

11. Facilities Siting:

The Contractor will site the NIROP facilities to the 1.25 TNT equivalence criteria to process Trident propellant.

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE	OF PAGES
U	1	2

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
P00001	See Block 16C	MR 396QSPN50	N/A

6. ISSUED BY — CODE N00030
STRATEGIC SYSTEMS PROGRAMS
1931 Jefferson Davis Hwy
Arlington, VA 22202-3518
Buyer/Symbol: T.Heilig/SPN-62
Phone: (703) 607-0910 Autovon: 327-0910

7. ADMINISTERED BY (If other than Item 6) — CODE S0602A
DCMAO, Denver
Orchard Place 2
5975 Greenwood Plaza Blvd.
Suite 200
Englewood, CO 80111-4715
ADP Point:
S2603A

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)
Alliant Techsystems, Inc.
Bacchus Works
P.O. Box 98
Magna, UT 84044-0098

CODE 3761 FACILITY CODE 10396

(X) 9A. AMENDMENT OF SOLICITATION NO.

9B. DATED (SEE ITEM 11)

X 10A. MODIFICATION OF CONTRACT/ORDER NO.
N00030-96-E-0068

10B. DATED (SEE ITEM 13)
8 Aug 1996

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

[ ] This above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers [ ] is extended [ ] is not extended.
Offers must acknowledge receipt of this amendment prior to the hour specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted such changes may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)
NO FUNDS INVOLVED

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS,
IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

[ ] B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation data, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).

C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:

X The "Changes-Cost Reimbursement" clause and the mutual agreement of the parties.

D. OTHER (Specify type of modification and authority).

E. IMPORTANT: Contractor [ ] is not, [X] is required to sign this document and return 6 copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

See Next Page

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)	
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
(Signature of person authorized to sign)		BY (Signature of Contracting Officer)	

ALLIANT TECHSYSTEMS CONTRACT/PROPOSAL REVIEW SHEET

PROPOSAL/CONTRACT NAME: NIROP FACILITIES USE CONTRACT	ORIGINATOR: JARED W. CHRISTENSEN REVIEWS REQUIRED:(CHECK) CORE X POLICY ___ LEGAL ___	DATE PREPARED: 10-10-96 Revised 3-17-97 DATE REQUIRED: ASAP
CONTRACT NO./PROPOSAL NO. N00030-96-E-0068 CHARGE CODE: CX 0003 EE	IMMEDIATE SUPERVISOR REVIEW: K. J. ABPLANALP 3/18/97	J. L. ANDERSON, PRGM MGR 3-18-97
CONTRACT/CUSTOMER: SSP	CORE REVIEW: COST ___ CNTRT: LLC DAVID H. PEET (or designee)	OTHER: 3/18/97
POLICY REVIEW: DAVID H. PEET (or designee) DATE:	LEGAL REVIEW: M. L. BELL/O. SIGGINS DATE:	PERTINENT INFO: RFP T/C & PPI: ___ CHECKLISTS: ___ DELEG. PKG: ___ MODEL CNT: ___

SUMMARY OF ACTION: THIS MOD STATES: "The contractor will site the NIROP facilities to the 1.25 TNT equivalence criteria to process Trident propellant. THERE ARE NO FUNDS PROVIDED FOR THIS REQUIREMENT.

OK - [illegible]
OK - [illegible]
OK - [illegible]

CORE REVIEW COMMENTS: Dave, 1.25 TNT factor does not apply to 1.3 Propellant (Delta & Pegasus). OK! OK! Jared 3-18-97 9 a.m.

☐ ADDITIONAL COMMENTS ATTACHED

POLICY REVIEW COMMENTS:

☐ ADDITIONAL COMMENTS ATTACHED

LEGAL REVIEW COMMENTS:

☐ ADDITIONAL COMMENTS ATTACHED

ALLIANTTECHSYSTEMS

Memorandum

Bacchus Works
Magna, Utah 84044-0098

Date 3-17-97
Subject NIROP Facilities Mod P00001

To Those Approving Mod P00001

From J. W. Christensen
Department N400 Contract Management
M/S GA24
Telephone 23433

This Mod P00001 for contract N00030-96-0068 has been held since October, pending the outcome of the different options. After study of the issue it has been determined that the impact is minimal and we should go ahead and send the signed mod to SSP. Please refer to the attached memo from C. F. Davis and D. Wheatley dated 6 March 1997 for more details.

Please approve or re-approve the attached review sheet if you concur with this decision.

Thank you!

ALLIANT TECHSYSTEMS

Memorandum

Bacchus Works
Magna, Utah 84044-0098

Ref. BH-NIR/003-97

Date	6 March 1997	From	C. F. Davis D. Wheatley
Subject	1.25 TNT Equivalency	Department	C240/3140
		M/S	X3G1/15
To	H. L. Aure	Telephone	23595/16058

The request by the Navy to have all buildings on NIROP which contain high energy propellant (D5) sited using a 1.25 TNT equivalency has been studied to determine the potential impact on processing and motor and propellant storage. The facilities that are most impacted are the rest houses (magazines). Most newer NIROP manufacturing facilities have been sited and posted to account for the 1.25 TNT equivalency. Buildings 49A and 47A have had site plans submitted to increase the explosive limit to accommodate First Stage D5. Use of the 1.25 TNT equivalency means four rest houses now being used or that will be used for motor or propellant storage must be reduced from 100,000 lbs. to 80,000 lbs. explosive limits. This reduces the storage capacity of individual rest houses from four S/S D-5 motors to three S/S D-5 motors and a subsequent reduction in the total storage capacity of motor resthouses (magazines) of four S/S D-5 motors. These four motors can be stored/accommodated in 36A or some other storage facilities on the Bacchus Works. If the additional resthouses are needed in the future, the limits will have to be reduced to 80,000 lbs. and facilities located to store the ingredients.

Based on the capacity review made by operations the current Bacchus propellant\motor storage and operating requirements can be met, including contractually required D-5 storage for motors and propellant ingredients, if the 1.25 TNT equivalency criteria for high energy propellant is imposed on NIROP facilities containing D5 propellant. The facilities reviewed are shown in Attachments 1 and 2.

cc: D. Sticinski
S. Boone
J. Vosburgh
J. Nichols
S. Marston
J. Anderson

From: Jerry Anderson
To: JWCHRISTENSEN
Date: 3/12/97 2:01pm
Subject: 1.25 TNT Equivalency

Jared, please send the contract letter agreeing to siting NIROP buildings to the 1.25 TNT equivalency immediately. If there are any questions please call at ex. 22154.

CC: HLAURE

251-343
253-76

ALLIANTTECHSYSTEMS

J. W. Christensen
Contract Administrator

Alliant Techsystems
Bacchus Works
P.O. Box 98
Magna, Utah 84044-0098

Tel (801) 250-5911
FAX (801) 251-2940

12 September 1996

In Reply Refer To:
FAC\N400\96-042

DIRECTOR STRATEGIC SYSTEMS PROGRAMS
CODE SPN-62 (T. L. HEILIG)
1931 JEFFERSON DAVIS HWY
ARLINGTON, VA 22202-3518

Subject: NIROP Facilities Use Contract N0030-96-E-0068 Modification P00001 Correction Request

Enclosure: Six (6) Copies of Modification P00001

Alliant hereby requests that the subject Mod P00001, Section H, Special Contract Requirements, 11. Facilities Siting be changed from:

> The Contractor will site their facilities to the 1.25 TNT equivalence criteria to process Trident propellant.

To the corrected wording as follows:

> The Contractor will site the NIROP facilities to the 1.25 TNT equivalence criteria to process Trident propellant.

We feel the wording "the NIROP facilities" more accurately indicates which facilities are involved. We have enclosed the six (6) copies of Mod P00001.

Please call me at 801-251-3433 or J. J. Anderson, Program Manager, at 801-251-2154 if you have any questions.

Sincerely,

Jared W. Christensen

J. W. Christensen
Contract Administrator

JWC:(FAC\kltr.md1)

cc:	J. J. Anderson	A24	H. L . Aure	A2
	C. W. Shearer (DCMO)	X11W	B. B. Kasperek	B1
	LCDR J. G. Giaquinto	B1	K. J. Abplanalp	ATR

BW-1000/89(REV 4/91)

SPN-62/SPLe:DRB/nb

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE	OF PAGES
U	1	2

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
P00001	See Block 16C	MR 396QSPN50	N/A

6. ISSUED BY — CODE N00030
STRATEGIC SYSTEMS PROGRAMS
1931 Jefferson Davis Hwy
Arlington, VA 22202-3518
Buyer/Symbol: T.Heilig/SPN-62
Phone: (703) 607-0910 Autovon: 327-0910

7. ADMINISTERED BY (If other than item 6) — CODE S0602A
DCMAO, Denver
Orchard Place 2
5975 Greenwood Plaza Blvd.
Suite 200
Englewood, CO 80111-4715
ADP Point:
S2603A

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)
Alliant Techsystems, Inc.
Bacchus Works
P.O. Box 98
Magna, UT 84044-0098

(X) 9A. AMENDMENT OF SOLICITATION NO.

9B. DATED (SEE ITEM 11)

X 10A. MODIFICATION OF CONTRACT/ORDER NO.
N00030-96-E-0068

10B. DATED (SEE ITEM 13)
8 Aug 1996

CODE 3761 FACILITY CODE 10396

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

[ ] This above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers [ ] is extended, [ ] is not extended.
Offers must acknowledge receipt of this amendment prior to the hour specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted such changes may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)
NO FUNDS INVOLVED

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS,
IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

~~THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.~~

[ ] B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).

[ ] C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:

[X] The "Changes-Cost Reimbursement" clause and the mutual agreement of the parties.

[ ] D. OTHER (Specify type of modification and authority).

E. IMPORTANT: Contractor [ ] is not, [X] is required to sign this document and return 6 copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

See Next Page

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)	
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
(Signature of person authorized to sign)		BY (Signature of Contracting Officer)	

ALL000082

ALLIANT TECHSYSTEMS CONTRACT/PROPOSAL REVIEW SHEET

PROPOSAL/CONTRACT NAME: FACILITIES USE MOD P1 CORRECTION	ORIGINATOR: J. W. CHRISTENSEN REVIEWS REQUIRED:(CHECK) CORE___ POLICY___ LEGAL___	DATE PREPARED: 9-12-96 DATE REQUIRED:
CONTRACT NO./PROPOSAL NO. FAC/N400/96-042 CHARGE CODE: Y10003EE	IMMEDIATE SUPERVISOR REVIEW: K. J. ABPLANALP	PRGM. MGR. J. J. ANDERSON
CONTRACT/CUSTOMER: SSP	CORE REVIEW: COST_____ CNTRT_____ DAVID H. PEET (or designee)	~~STAFF~~: H. L. Thune
POLICY REVIEW: DAVID H. PEET (or designee) DATE:	LEGAL REVIEW: M. L. BELL/O. SIGGINS DATE:	PERTINENT INFO: RFP T/C & PPI: ____ CHECKLISTS: ____ DELEG. PKG: ____ MODEL CNT: ____

SUMMARY OF ACTION: CORRECTION OF: THE CONTRACTOR WILL SITE THEIR FACILITIES TO THE NIROP FACILITIES TO THE 1.25 TNT EQUIVALENCE CRITERIA TO PROCESS TRIDENT PROPELLANT.

CORE REVIEW COMMENTS:

☐ ADDITIONAL COMMENTS ATTACHED

POLICY REVIEW COMMENTS:

☐ ADDITIONAL COMMENTS ATTACHED

LEGAL REVIEW COMMENTS:

☐ ADDITIONAL COMMENTS ATTACHED

M.U. 4701 Facilities Use

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE	OF	PAGES
B	1		1

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. *(If applicable)*
A00001	96NOV25		

6. ISSUED BY CODE	S0602A	7. ADMINISTERED BY *(If other than Item 6)* CODE	

2870
O ALLIANT TECHSYSTEMS, INC
BACCHUS WORKS
PO BOX 37
MAGNA, UT 84044-0037
LEEN OLSEN, (801) 251-1136

8. NAME AND ADDRESS OF CONTRACTOR *(No., street, county, State and ZIP Code)*	(X)	9A. AMENDMENT OF SOLICITATION NO.
		9B. DATED *(SEE ITEM 11)*
	X	10A. MODIFICATION OF CONTRACT/ORDER NO. N00030-96-E-0068
		10B. DATED *(SEE ITEM 13)* 96AUG05

LLIANT TECHSYSTEMS, INC
ACCHUS WORKS
O BOX 98, MAIL STOP KF14
TTN; JARED CHRISTENSEN
AGNA, UT 84044-0098

CODE 02XC1	FACILITY CODE

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

ffer must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods:

By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer bmitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE CEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by tue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to s solicitation and this amendment, and is received prior to the opening hour and date specified.

12. Accounting and Appropriation Data *(If required)*

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: *(Specify authority)* THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES *(such as changes in paying office, appropriation date, etc)*. SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).

C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:

D. OTHER *(Specify type of modification and authority)*

IMPORTANT: Contractor ☒ is not, ☐ is required to sign this document and return _____ copies to the issuing office.

DESCRIPTION OF AMENDMENT/MODIFICATION *(Organized by UCF section headings, including solicitation/contract subject matter where feasible.)*

This administrative modification is issued to correct the SF26 (Award/Contract), Block 7 Cage Code 3761.

FROM: 3761 TO: 02XC1

All other terms and conditions of this contract remain the same.

cept as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full ce and effect.

15A. NAME AND TITLE OF SIGNER *(Type or print)*		16A. NAME AND TITLE OF CONTRACTING OFFICER *(Type or print)* STEVEN W SUMSION Administrative Contracting Officer	
15B. CONTRACTOR/OFFEROR *(Signature of person authorized to sign)*	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA BY Steven Sumsion *(Signature of Contracting Officer)*	16C. DATE SIGNED 25 Nov 96

AWARD/CONTRACT

1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 350) | RATING: DX-A2 | PAGE OF PAGES: 1 34

2. CONTRACT (Proc. Inst. Ident.) NO.: N00030-96-E-0068
3. EFFECTIVE DATE: 05 August 1996
4. REQUISITION/PURCHASE REQUEST/PROJECT NO.: PR 396QSPN47

ISUED BY: CODE N00030
RATEGIC SYSTEMS PROGRAMS
EPT OF THE NAVY, WASHINGTON, DC 20376-5002
Buyer/Symbol: Tom Heilig/SPN-62
Phone: (703) 607-5362

6. ADMINISTERED BY (If other than Item 5) CODE S0602A
DCMAO, Denver
Orchard Place 2
5975 Greenwood Plaza Blvd.
Suite 200
Englewood, CO 80111-4715
ADP Point: S2603A
SCD: A

NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)

Alliant Techsystems, Inc.
Bacchus Works
P.O. BOX 98, Mail Stop KF 14
Attn: Jarad Christensen
Magna, Utah 84044-0098

8. DELIVERY
[ ] FOB ORIGIN [X] OTHER (See below)

9. DISCOUNT FOR PROMPT PAYMENT
N/A

10. SUBMIT INVOICES (4 copies unless otherwise specified) TO THE ADDRESS SHOWN IN: ITEM See Sec. G

CODE 3761 FACILITY CODE 10396

7. SHIP TO/MARK FOR CODE
N/A

12. PAYMENT WILL BE MADE BY CODE
DFAS-COLUMBUS CENT
GATEWAY CONTRACT ACCT DIV
P.O. BOX 182251, COLUMBUS, OH 43218-2251

13. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION:
10 U.S.C. (c)(1)

14. ACCOUNTING AND APPROPRIATION DATA
NO FUNDS INVOLVED

15A. ITEM NO.	15B. SUPPLIES/SERVICES	15C. QUANTITY	15 D. UNIT	15 E. UNIT PRICE	15F. AMOUNT
	See Sections B and C				
				15G. TOTAL AMOUNT OF CONTRACT	$

16. TABLE OF CONTENTS

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B	SUPPLIES OR SERVICES AND PRICES/COSTS	2			PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.	
C	DESCRIPTION/SPECS./WORK STATEMENT	2	X	J	LIST OF ATTACHMENTS	6
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E	INSPECTION AND ACCEPTANCE	2	X	K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	7
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CONTRACTING OFFICER WILL COMPLETE ITEM 17 OR 18 AS APPLICABLE

17. ____ CONTRACTOR'S NEGOTIATED AGREEMENT (Contractor is required to sign this document and return 6 copies to issuing office.) Contractor agrees to furnish and deliver all items or perform all the services set forth or otherwise identified above and on any continuation sheets for the consideration stated herein. The rights and obligations of the parties to this contract shall be subject to and governed by the following documents: (a) this award/contract, (b) the solicitation, if any, and (c) such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein (Attachments are listed herein.)

18. ____ AWARD (Contractor is not required to sign this document.) Your offer on Solicitation Number ____ including the additions or changes made by you which additions or changes are set forth in full above, is hereby accepted as to the items listed above and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the Government's solicitation and your offer, and (b) this award/contract. No further contractual document is necessary.

NAME AND TITLE OF SIGNER (Type or print)
L. Aure
ice President Navy Programs

20A. NAME AND TITLE OF CONTRACTING OFFICER
THOMAS L. HEILIG
Contracting Officer

ME OF CONTRACTOR | 19C. DATE SIGNED | 20B. UNITED STATES OF AMERICA | 20. DATE SIGNED

L. Aure
(Signature of person authorized to sign) 7/31/96

BY Thomas L. Heilig
(Signature of Contracting Officer) 2 Aug. 1996

PART I - THE SCHEDULE

SECTION B- SUPPLIES OR SERVICES AND PRICES/COSTS

The parties hereto agree that the terms and conditions of this facilities use contract shall apply to those facilities provided to the Contractor by the Government (Strategic Systems Programs, Department of the Navy) for the Contractor's use in performance of contracts or subcontracts, or both, for the Fleet Ballistic Missile (FBM) System. The Contractor agrees to use, maintain, account for, and dispose of such facilities in accordance with the terms and conditions of this facilities use contract.

Item 0001 - Severable Facilities

Item 0002 - Non-Severable Facilities

SECTION C - DESCRIPTION/SPECIFICATIONS/WORK STATEMENT

N/A

SECTION D - PACKAGING AND MARKING

N/A

SECTION E - INSPECTION OR ACCEPTANCE

N/A

SECTION F- DELIVERIES OR PERFORMANCE

N/A

SECTION G - CONTRACT ADMINISTRATION DATA

SSP 5252.204-9750
Cognizant Contract Administration Services (CAS) Component (Feb 1993)

Except as specified elsewhere in this contract, the Defense Contract Management Command (DCMAO), Denver, Orchard Place 2, 5975 Greenwood Plaza Blvd., Suite 200, Englewood, CO 80111-4715, is designated as the Contract Administration Services (CAS) Component having cognizance over this contract. The CAO is authorized approval of contractor category D waivers as defined in SSPINST 4200.1 and OD 40825, unless this authority is specifically withheld. Approval of all other Waivers and Deviations from contractual requirements is not authorized except to the extent delegated by official correspondence from either the Director, Strategic Systems Programs (DIRSSP) or the Procuring Contracting Officer. Except as modified by separate delegations from the DIRSSP, normal contract administration functions will be performed in accordance with FAR 42.302.

SSP 5252.204-9751
Cognizant Contract Programmatic and Technical Authority (Feb 1993)

The PMO SSP, Detachment, Magna, Utah has been designated as the on-site representative of the Director, Strategic Systems Programs (DIRSSP) with delegated authorities on programmatic and technical requirements on the FBMWS/SWS. Guidance regarding programmatic and technical requirements shall be provided to the CAS Component by the PMO/SSP, Detachment, Magna, Utah in accordance with DOD FAR Supplement (DFARS) 246.103(c), as necessary.

SSP 5252.204-9752
Exception to Contract Administration Delegation (Dec 1995)

The administration and reporting of individual small business subcontracting plans under this contract shall be retained by the DIRSSP (SP-01G1) despite other delegations of contract administration functions.

Additional Exception to Contract Administration Delegation:

The function identified in FAR 42.302(a)(30)(iii) shall be retained by the DIRSSP notwithstanding the other delegations of contract administration functions.

SECTION H - SPECIAL CONTRACT REQUIREMENTS

Facilities:

1. The facilities accountable under this contract (and previously accountable under Contract N00030-91-E-0119) are identified in enclosure (1) to Alliant Ltr Fac/N400/96-013 of 02 April 1996, which is hereby incorporated by reference. This list shall be revised from time to time, as necessary, to reflect additions to and deletions from the list of facilities which have been provided to the Contractor. The revised list shall not be effective until approved by the cognizant Government Property Administrator.

2. Unless otherwise approved by the DCMAO, Denver, all facilities covered hereunder shall be located and used at Alliant Techsystems Inc., Bacchus Works Plant #1, Magna, Utah; Plant #2 in Clearfield, Utah; and the Navy-owned Plant #81 in Magna, Utah; and the Tekoi Test Range.

3. The Contractor shall, unless otherwise directed in writing by the Procuring Contracting Officer (PCO)(SPN), give first priority of use for the facilities accountable under this contract to work on behalf of SSP (Code SP-27).

4. The Contractor must obtain PCO approval before making either capital modifications to or usage changes of facilities.

5. On or before 31 October 1996 and annually thereafter, the Contractor shall submit to the PCO via the ACO, DCMAO, Denver,an updated list indicating the following information for all facilities which are accountable under this contract:

(a) Abbreviated description, acquisition cost, and year of acquisition of each item together with the total cost of all facilities.

(b) Identification number assigned to each item.

6. Contaminated Government Property:

Notwithstanding any other provision of this contract, the Contractor shall not be required to sell any Government property and/or material determined by the Contractor (and approved by the cognizant Government Property Administrator for the Contractor's plant) to have become contaminated in any manner, to the extent that such property/material may be injurious to the health and/or life of any would-be purchaser.

7. Retention Review:

An annual review by the Contractor and the ACO (and/or other Government representatives) will be made of the updated list of facilities for a current determination as to the continued requirement for retention. This review may be requested by the Contracting Officer at more frequent intervals if deemed necessary.

8. Capital Maintenance:

The Government will provide no maintenance, repair, rehabilitation, or replacement of the severable facilities accountable to this contract.

9. Correspondence:

All correspondence pertaining to this contract and requiring action not delegated to DCMAO shall be forwarded via the Cognizant Administration Contracting Officer (ACO) DCMAO, Denver:

Director Strategic Systems Programs
1931 Jefferson Davis Highway
Arlington, Virginia 22202-3518
Attn: Code SPN-62

10. Period of this Contract:

Item 0001 - 5 August 1996 through 4 August 2001.
Item 0002 - 5 August 1996 through 4 August 1997, unless extended by mutual agreement of the parties.

PART II - CONTRACT CLAUSES

SECTION I - CONTRACT CLAUSES INCORPORATED BY REFERENCE (FACILITIES USE)

a. This contract incorporates the following clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available.

Federal Acquisition Regulation (FAR) (48 CFR Chapter 1) Clauses and DOD FAR Supplement (48 CFR Chapter 2) Clauses

Clause No.	Title and Date	Clause Text
1.	Definitions (Oct 1995)	52.202-01
2.	Gratuities (Apr 1984)	52.203-03
3.	Covenant Against Contingent Fees (Apr 1984)	52.203-05
4.	Anti-Kickback Procedures (Jul 1995)	52.203-07
5.	Security Requirements (Apr 1984)	52.204-02
6.	Printing/Copying Double-Sided on Recycled Paper (May 1995)	52.204-04
7.	Examination of Records by Comptroller General (Jul 1995)	52.215-01
8.	Audit-Negotiation (Oct 1995) Alternate I (Apr 1984)	52.215-02
9.	Order of Precedence (Jan 1986)	52.215-33
10.	Allowable Cost and Payment - Facilities Use (Apr 1984)	52.216-14
11.	Convict Labor (Apr 1984)	52.222-03
12.	Contract Work Hours and Safety Standards Act - Overtime Compensation (Jul 1995)	52.222-04
13.	Equal Opportunity (Apr 1984)	52.222-26
14.	Affirmative Action for Special Disabled and Vietnam Era Veterans (Apr 1984)	52.222-35
15.	Affirmative Action for Handicapped Workers (Apr 1984)	52.222-36
16.	Clean Air and Water (Apr 1984)	52.223-02
17.	Restrictions on Certain Foreign Purchases (May 1992)	52.225-11
18.	Interest (Jan 1991)	52.232-17

(Underlining denotes changes made in this Revision)

19.	Limitation of Cost (Facilities) (Apr 1984)	52.232-21
20.	Assignment of Claims (Jan 1986)	52.232-23
21.	Prompt Payment (Mar 1994)	52.232-25
22.	Disputes (Oct 1995) - Alternate I (Dec 1991)	52.233-01
23.	Notice of Intent to Disallow Costs (Apr 1984)	52.242-01
24.	Changes - Cost Reimbursement (Aug 1987) Alternate IV (Apr 1984)	52.243-02
25.	Change Order Accounting (Apr 1984)	52.243-06
26.	Subcontracts Under Cost Reimbursement and Letter Contracts (Feb 1995) Alternate I (Jul 1995)	52.244-02
27.	Competition in Subcontracting (Apr 1984)	52.244-05
28.	Liability for the Facilities (Apr 1984)	52.245-08 ✓
29.	Use and Charges (Apr 1984)	52.245-09 ✓
30.	Government Property (Facilities Use) (Apr 1984)	52.245-11 ✓
31.	Facilities Equipment Modernization (Apr 1985)	52.245-16
32.	Inspection of Facilities (Apr 1984)	52.246-10 ✓
33.	Commercial Bill of Lading Notations (Apr 1984)	52.247-01
34.	Failure to Perform (Apr 1984)	52.249-13
35.	Computer Generated Forms (Jan 1991)	52.253-01
36.	Contracting Officer's Representative (Dec 1991)	252.201-7000
37.	Disclosure of Information (Dec 1991)	252.204-7000
38.	Control of Government Personnel work Product (Apr 1992)	252.204-7003
39.	Drug-Free Work Force (Sep 1988)	252.223-7004
40.	Prohibition on Storage and Disposal of Toxic and Hazardous Materials (Apr 1993)	252.223-7006
41.	Safety Precautions for Ammunition and Explosives (May 1994)	252.223-7002
42.	Change in Place of Performance - Ammunition and Explosives (Dec 1991)	252.223-7003
43.	Reduction or Suspension of Contract Payments Upon Finding of Fraud (Aug 1992)	252.232-7006
44.	Postaward Conference (Dec 1991)	252.242-7000
45.	Reports of Government Property (May 1994)	252.245-7001
46.	Notification of Proposed Program Termination or Reduction (May 1995)	252.249-7002

PART III - LIST OF DOCUMENTS, EXHIBITS, AND OTHER ATTACHMENTS

SECTION J - LIST OF ATTACHMENTS

N/A

PART IV - REPRESENTATIONS AND INSTRUCTIONS

SECTION K - REPRESENTATIONS, CERTIFICATIONS, AND OTHER STATEMENTS OF OFFERORS

The Offeror/Quoter represents and certifies as part of his proposal/quotation that: (Check or complete all applicable boxes or blocks.)

1. CERTIFICATE OF INDEPENDENT PRICE DETERMINATION (Apr 1985) (Applicable only to offers where a firm fixed price contract or fixed price contract with escalation is to be awarded) (FAR 52.203-02)

(a) The offeror certifies that--

(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered;

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each signature on the offer is considered to be a certification by the signatory that the signatory --

(1) Is the person in the offeror's organization responsible for determining the prices being offered in this bid or proposal, and that the signatory has not participated and will not participate in any action contrary to subparagraphs (a)(1) through (a)(3) above; or

(2)(i) Has been authorized, in writing, to act as agent for the following principles in certifying that those principles have not participated, and will not participate in any action contrary to subparagraphs (a)(1) through (a)(3) above _____ _____[insert full name of person(s) in the offeror's organization responsible for determining the prices offered in this bid or proposal, and the title of his or her position in the offeror's organization];

(ii) As an authorized agent, does certify that the principles named in subdivision (b)(2)(i) above have not participated, and will not participate, in any action contrary to subparagraphs (a)(1) through (a)(3) above; and

(Underlining denotes changes made in this edition)

2-96

(iii) As an agent, has not personally participated, and will not participate, in any action contrary to subparagraphs (a)(1) through (a)(3) above.

(c) If the offeror deletes or modifies subparagraph (a)(2) above, the offeror must furnish with its offer a signed statement setting forth in detail the circumstances of the disclosure.

2. CONTINGENT FEE REPRESENTATION AND AGREEMENT (Apr 1984) (FAR 52.203-04)

(a) Representation. The offeror represents that, except for full-time bonafide employees working solely for the offeror, the offeror -- [Note: The offeror must check the appropriate boxes. For interpretation of the representation, including the term "bona fide employee," see Subpart 3.4 of the Federal Acquisition Regulation.]

(1) [ ] has, [X] has not employed or retained any person or company to solicit or obtain this contract; and

(2) [ ] has, [X] has not paid or agreed to pay to any person or company employed or retained to solicit or obtain this contract any commission, percentage, brokerage, or other fee contingent upon or resulting from the award of this contract.

(b) Agreement. The offeror agrees to provide information relating to the above Representation as requested by the Contracting Officer and, when subparagraph (a)(1) or (a)(2) is answered affirmatively, to promptly submit to the Contracting Officer--

(1) A completed Standard Form 119, Statement of Contingent or Other Fees, (SF 119); or

(2) A signed statement indicating that the SF 119 was previously submitted to the same contracting office, including the date and applicable solicitation or contract number, and representing that the prior SF 119 applies to this offer or quotation.

3. CERTIFICATE OF PROCUREMENT INTEGRITY (NOV 1990) (Applicable if required by paragraph (c) of the clause of this contract entitled, "Requirement for Certificate of Procurement Integrity (NOV 1990) Alternate I (SEP 1990)" (FAR 52.203-08))

(1) I, J. W. Christensen [Name of certifier], am the officer or employee responsible for the preparation of this offer and hereby certify that, to the best of my knowledge and belief, with the exception of any information described in this certificate, I have no information concerning a violation or possible violation of subsection 27(a), (b), (d), or (f) of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 423), (hereinafter referred to as "the Act"), as implemented in the FAR, occurring during the conduct of this procurement (solicitation number).

FAC/N400/96-011

2-96

(2) As required by subsection 27(e)(1)(B) of the Act, I further certify that, to the best of my knowledge and belief, each officer, employee, agent, representative, and consultant of [**Name of Offeror**] who has participated personally and substantially in the preparation or submission of this offer has certified that he or she is familiar with, and will comply with, the requirements of subsection 27(a) of the Act, as implemented in the FAR, and will report immediately to me any information concerning a violation or possible violation of subsections 27(a),(b),(d), or (f) of the Act, as implemented in the FAR, pertaining to this procurement.

(3) Violations or possible violations: (**Continue on plain bond paper if necessary and label Certificate of Procurement Integrity (Continuation Sheet),** ENTER NONE IF NONE EXIST

None

(4) I agree that, if awarded a contract under this solicitation, the certifications required by subsection 27(e)(1)(B) of the Act shall be maintained in accordance with paragraph (f) of this provision.

[**Signature of the officer or employee responsible for the offer and date**] J. W. Christensen 7-31-96

[**Typed name of the officer or employee responsible for the offer**]
J. W. Christensen, Contract Administrator

"Subsections 27(a),(b), and (d) are effective on December 1, 1990. Subsection 27(f) is effective on June 1, 1991.
THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING OF A FALSE, FICTITIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER TITLE 18, UNITED STATES CODE SECTION 1001.

[End of Certification]

4. CERTIFICATE OF PROCUREMENT INTEGRITY-MODIFICATION (NOV 1990) (In accordance with the clause of this contract entitled "Requirement for Certificate of Procurement Integrity-Modification (NOV 1990)" (FAR 52.203-09), applicable to any modification which includes this Certificate)

(1) I, [**Name of certifier**] am the officer or employee responsible for the preparation of this modification proposal and hereby certify that, to the best of my knowledge and belief, with the exception of

any information described in this certification, I have no information concerning a violation or possible violation of subsection 27(a),(b),(d), or (f) of the Office of Federal Procurement Policy Act, as amended* (41 U.S.C. 423), hereinafter referred to as "the Act"), as implemented in the FAR, occurring during the conduct of this procurement (contract and modification number).

(2) As required by subsection 27(e)(1)(B) of the Act, I further certify that to the best of my knowledge and belief, each officer, employee, agent, representative, and consultant of [Name of Offeror] who has participated personally and substantially in the preparation or submission of this proposal has certified that he or she is familiar with, and will comply with, the requirements of subsection 27(a) of the Act, as implemented in the FAR, and will report immediately to me any information concerning a violation or possible violation of subsections 27(a),(b),(d), or (f) of the Act, as implemented in the FAR, pertaining to this procurement.

(3) Violations or possible violations: (Continue on plain bond paper if necessary and label Certificate of Procurement Integrity-Modification (Continuation Sheet), ENTER "NONE" IF NONE EXISTS)__

_____

_____

[Signature of the officer or employee responsible for the modification proposal and date]_____

[Typed name of the officer or employee responsible for the modification proposal] _____

*Subsections 27(a),(b), and (d) are effective on December 1, 1990. Subsection 27(f) is effective on June 1991.

THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING OF A FALSE, FICTITIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER TITLE 18, UNITED STATES CODE, SECTION 1001.

[End of Certification]

5. CERTIFICATION AND DISCLOSURE REGARDING PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS (APR 1991) (Applicable to Contracts in excess of $100,000 (FAR 52.203-11))

(a) The definitions and prohibitions contained in the clause, at FAR 52.203-12, Limitation on Payments to Influence Certain Federal Transactions, included in this solicitation, are hereby incorporated by reference in paragraph (b) of this certification.

(b) The offeror, by signing its offer, hereby certifies to the best of his or her knowledge and belief that on or after December 23, 1989,

[see next page]

(1) No Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on his or her behalf in connection with the awarding of any Federal contract, the making of any federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension continuation, renewal, amendment or modification of any Federal contract, grant, loan, or cooperative agreement;

(2) If any funds other than Federal appropriated funds (including profit or fee received under a covered Federal transaction) have been paid, or will be paid, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on his or here behalf in connection with this solicitation, the offeror shall complete and submit, with its offer, OBM standard form LLL, Disclosure of Lobbying Activities, to the Contracting Officer; and

(3) He or she will include the language of this certification in all subcontract awards at any tier and require that all recipients of subcontract awards in excess of $100,000 shall certify and disclosure accordingly.

(c) Submission of this certification and disclosure is a prerequisite for making or entering into this contract imposed by section 1352, title 31, United States Code. Any person who makes an expenditure prohibited under this provision or who fails to file or amend the disclosure form to be filed or amended by this provision, shall be subject to a civil penalty of not less than $10,000, and not more than $100,000, for each such failure.

(End of provision)

6. TAXPAYER IDENTIFICATION (May 1994) (FAR 52.204-03)

(a) Definitions.

"Common parent," as used in this solicitation provision, means that corporate entity that owns or control an affiliated group of corporations that files its Federal income tax returns on a consolidated basis, and of which the offeror is a member.

Corporate status," as used in this solicitation provision, means a designation as to whether the offeror is a corporate entity, an unincorporated entity (e.g., sole proprietorship or partnership), or a corporation providing medical and health care services.

"Taxpayer Identification Number (TIN)," as used in this solicitation provision, means the number required by the IRS to be used by the offeror in reporting income tax and other returns.

(b) All offerors are required to submit the information required in paragraphs (c) through (e) of this solicitation provision in order to comply with reporting requirements of 26 U.S.C. 6041, 6041A, and 6050M and implementing regulations issued by the Internal Revenue Service (IRS). If the resulting contract is subject to the reporting requirements described in 4.903, the failure or refusal by the offeror to furnish the information may result in a 31 percent reduction of payments otherwise due under the contract.

(c) Taxpayer Identification Number (TIN).
(X) TIN: 41-1672694.
( ) TIN has been applied for
( ) TIN is not required because:
( ) Offeror is a nonresident alien, foreign corporation, or foreign partnership that does not have income effectively connected with the conduct of a trade of business in the U.S. and does not have an office or place of business or a fiscal paying agent in the U.S.;
( ) Offeror is an agency of instrumentality of a foreign government;
( ) Offeror is an agency or instrumentality of a Federal, state, or local government;
( ) Other. State basis._____

(d) Corporate Status.
( ) Corporation providing medical and health care services, or engaged in the billing and collecting of payments for such services;
(X) Other corporate entity;
( ) Not a corporate entity;
( ) Sole proprietorship;
( ) Partnership;
( ) Hospital or extended care facility described in 26 CFR 501(c)(3) that is exempt from taxation under 26 CFR 501(a).

(e) Common Parent.
(X) Offeror is not owned or controlled by a common parent as defined in paragraph (a) of this clause.

( ) Name and TIN of common parent:
Name_____

TIN_____

7. WOMEN-OWNED BUSINESS (OCT 1995) (FAR 52.204-05)

(a) Representation. The offeror represents that it [ ] is, [X] is not a women-owned business concern.

(b) Definition. "Women-owned business concern," as used in this provision, means a concern which is at least 51 percent owned by one or more women; or in the case of any publicly owned business, at

least 51 percent of the stock of which is owned by one or more women; and whose management and daily business operations are controlled by one or more women.

8. ECONOMIC PURCHASE QUANTITY-SUPPLIES (AUG 1987) (Applicable to Contracts for Supplies only) (FAR 52.207-04)

(a) Offerors are invited to state an opinion on whether the quantity(ies) of supplies on which bids, proposals or quotes are requested in this solicitation is (are) economically advantageous to the Government.

_____

_____

_____

(b) Each offeror who believes that acquisition in different quantities would be more advantageous is invited to recommend an economic purchase quantity. If different quantities are recommended, a total and a unit price must be quoted for applicable items. An economic purchase quantity is that quantity at which a significant price break occurs. If there are significant price breaks at different quantity points, this information is desired as well.

	OFFEROR RECOMMENDATIONS		
ITEM	QUANTITY	PRICE QUOTATION	TOTAL

(c) The information requested in this provision is being solicited to avoid acquisitions in disadvantageous quantities and to assist the Government in developing a data base for future acquisitions of these items. However, the Government reserves the right to amend or cancel the solicitation and resolicit with respect to any individual item in the event quotations received and the Government's requirements indicate that different quantities should be acquired.

9. JEWEL BEARINGS AND RELATED ITEMS CERTIFICATE (Apr 1984) (FAR 52.208-02)

(a) This is to certify that--

(1) Jewel bearings and/or related items, as defined in the Required Sources for Jewel Bearings and Related Items clause, ~~will be incorporated into one or more items~~/will not be incorporated into any item [delete one] covered by this offer;

(2) Any jewel bearings required (or an equal quantity of the same type, size, and tolerances) will be ordered from the William Langer Plant, Rolla, North Dakota 58367, as provided in the Required Sources for Jewel Bearings, and Related Items clause; and

(3) Any related items required (or an equal quantity of the same type, size, and tolerances) will be acquired from domestic manufacturers, including the Plant, if the items can be obtained from those sources.

(b) Attached to this certificate are estimates of the quantity, type, and size, (including tolerances) of the jewel bearings and related items required, and identification of the components, subassemblies, or parts that require jewel bearings or related items.

Date of Execution: _____

Solicitation No.: _____

Name: _____

Title: _____

Firm: _____

Address: _____

10. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, PROPOSED DEBARMENT, AND OTHER RESPONSIBILITY MATTERS (MAY 1989) (FAR 52.209-05)

(a)(1) The Offeror certifies, to the best of its knowledge and belief, that -

(i) The Offeror and/or any of its Principals-

(A) Are [ ] are not [X] presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency;

(B) Have [ ] have not [X], within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal,

state, or local) contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; and

(C) Are [ ] are not [X] presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in subdivision (a)(1)(i)(B) of this provision.

(ii) The Offeror has [ ] has not [X], within a three-year period preceding this offer, had one or more contracts terminated for default by any Federal agency.

(2) "Principals," for the purposes of this certification, means officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).

THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING OF A FALSE, FICTITIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER SECTION 1001, TITLE 18, UNITED STATES CODE.

(b) The Offeror shall provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

(c) A certification that any of the items in paragraph (a) of this provision exists will not necessarily result in withholding of an award under this solicitation. However, the certification will be considered in connection with a determination of the Offeror's responsibility. Failure of the Offeror to furnish a certification or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(d) Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the certification required by paragraph (a) of this provision. The knowledge and information of an Offeror is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

(e) The certification in paragraph (a) of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the

Offeror knowingly rendered an erroneous certification, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation for default.

11. AUTHORIZED NEGOTIATORS (Apr 1984) (FAR 52.215-11)

The offeror or quoter represents that the following persons are authorized to negotiate on its behalf with the Government in connection with this request for proposals or quotations: [list names, titles, and telephone numbers of the authorized negotiators].

J. W. Christensen, Contract Administrator - (801) 251-3433

K. J. Abplanalp, Manager Navy Contracts (801) 251-3735

D. H. Peet, Director Cont. Adm. Policy & Proposal Adm. (801) 251-5607

J. J. Anderson, Program Manager (801) 251-2154

12. PLACE OF PERFORMANCE (Apr 1984) (FAR 52.215-20)

(a) The offeror or quoter, in the performance of any contract resulting from this solicitation, [ ] intends, [X] does not intend (check applicable block) to use one or more plants or facilities located at a different address from the address of the offeror or quoter as indicated in this proposal or quotation.

(b) If the offeror or quoter checks "intends" in paragraph (a) above, it shall insert in the spaces provided below the required information:

Place of Performance (Street Address, City, County, State, Zip Code)	Name and Address of Owner and Operator of the Plant or Facility Other than Offeror or Quoter

13. FACILITIES CAPITAL COST OF MONEY (Sep 1987) (Applicable to contracts subject to FAR Part 31) (FAR 52.215-30) N/A

In accordance with the clause of this contract entitled "Facilities Capital Cost of Money (Sep 1987)", the Offeror [ ] has, [ ] has not proposed facilities capital cost of money as an allowable cost.

14. SMALL BUSINESS PROGRAM REPRESENTATION (OCT 1995) (FAR 52.219-01)

(a)(1)The standard industrial classification (SIC) code for this acquisition is 3761 (insert SIC code).

(2)The small business size standard is 1,000 Employees (insert size standard).

(3)The small business size standard for a concern which submits an offer in its own name, other than on a construction or service contract, but which proposes to furnish a product which it did not itself manufacture, is 500 employees.

(b)Representations. (1) The offeror represents and certifies as part of its offer that it [ ] is, [X] is not a small business concern.

(2) (Complete only if offeror represented itself as a small business concern in block (b)(1) of this section.) The offeror represents as par of its offer that it [ ] is, [ ] is not a small disadvantaged business concern.

(3) (Complete only if offeror represented itself as a small business concern in block (b)(1) of this section.) The offeror represents as part of its offer that it [ ] is, [ ] is not a women-owned small business concern.

(c) Definitions. "Small business concern," as used in this provision, means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria in 13 CFR Part 121 and the size standard in paragraph (a) of this provision.

"Small disadvantaged business concern," as used in this provision means a small business concern that (1) is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals, and (2) has its management and daily business controlled by one or more such individuals. This term also means a small business concern that is at least 51 percent unconditionally owned by an economically disadvantaged Indian tribe or Native Hawaiian Organization, or a publicly owned business having at least 51 percent of its stock unconditionally owned by one or more of these entities, which has its management and daily business controlled by member of an economically disadvantaged Indian tribe or Native Hawaiian Organization, and which meets the requirements of 13 CFR Part 124.

"Woman-owned small business concern," as used in this provision, means a small business concern-

[see next page]

(1) Which is a least 51 percent owned by one or more women or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and

(2) Whose management and daily business operations are controlled by one or more women.

(d) Notice. (1) If this solicitation is for supplies and has been set aside, in whole or in part, for small business concerns, then the clause in this solicitation providing notice of the set-aside contains restrictions on the source of the end items to be furnished.

(2) Under 15 U.S.C. 645(d), any person who misrepresents a firm's status as a small or small disadvantaged business concern in order to obtain a contract to be awarded under the preference programs established pursuant to sections 8(a),8(d),9, or 15 of the Small Business Act or any other provision of Federal law that specifically references section 8(d) for a definition of program eligibility, shall-

(i) Be punished by imposition of fine, imprisonment, or both;

(ii) Be subject to administrative remedies, including suspensions and debarment; and

(iii) Be ineligible for participation in programs conducted under the authority of the Act.

[End of provision]

15. CERTIFICATION OF NONSEGREGATED FACILITIES (Apr 1984) (FAR 52.222-21)

(a) "Segregated facilities," as used in this provision, means any waiting rooms, work areas, rest rooms and wash rooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreational or entertainment areas, transportation, and housing facilities provided for employees, that are segregated by explicit directive or are in fact segregated on the basis of race, color, religion, or national origin because of habit, local custom, or otherwise.

(b) By the submission of this offer, the offeror certifies that it does not and will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it does not and will not permit its employees to perform their services at any location under its control where segregated facilities are maintained. The offeror agrees that a breach of this certification is a violation of the Equal Opportunity clause in this contract.

(c) The offeror further agrees that (except where it has obtained identical certifications from proposed subcontractors for specific time periods) it will--

[see next page]

(1) Obtain identical certifications from proposed subcontractors before the award of subcontracts under which the subcontractor will be subject to the Equal Opportunity clause;
(2) Retain the certifications in the files; and

(3) Forward the following notice to the proposed subcontractors (except if the proposed subcontractors have submitted identical certifications for specific time periods):

NOTICE TO PROSPECTIVE SUBCONTRACTORS OF REQUIREMENT FOR CERTIFICATIONS OF NONSEGREGATED FACILITIES.

A Certification of Nonsegregated Facilities must be submitted before the award of a subcontract under which the subcontractor will be subject to the Equal Opportunity clause. The certification may be submitted either for each subcontract or for all subcontracts during a period (i.e., quarterly, semiannually, or annually).

NOTE: The penalty for making false statement in offers is prescribed in 18 U.S.C. 1001.

16. PREVIOUS CONTRACTS AND COMPLIANCE REPORTS (Apr 1984) (FAR 52.222-22)

The offeror represents that --
(a) It [X] has, [ ] has not participated in a previous contract or subcontract subject either to the Equal Opportunity clause of this solicitation, the clause originally contained in Section 310 of Executive Order No. 10925, or the clause contained in Section 201 of Executive Order No. 11114;
(b) It [X] has, [ ] has not, filed all required compliance reports; and
(c) Representations indicating submission of required compliance reports, signed by proposed subcontractors, will be obtained before subcontract awards.

17. AFFIRMATIVE ACTION COMPLIANCE (Apr 1984) (FAR 52.222-25)

The offeror represents that (a) it [X] has developed and has on file, [ ] has not developed and does not have on file, at each establishment, affirmative action programs required by the rules and regulations of the Secretary of Labor (41 CFR 60-1 and 60-2), or (b) it [ ] has not previously had contracts subject to the written affirmative action programs requirement of the rules and regulations of the Secretary of Labor.

18. CLEAN AIR AND WATER CERTIFICATION (Apr 1984) (FAR 52.223-01)

The offeror certifies that--
(a) Any facility to be used in the performance of this proposed contract is [ ], is not [X] listed on the Environmental Protection Agency List of Violating Facilities;

(b) The offeror will immediately notify the Contracting Officer, before award, of the receipt of any communication from the Administrator, or a designee, of the Environmental Protection Agency, indicating that any facility that the Offeror proposes to use for the performance of the contract is under consideration to be listed on the EPA List of Violating Facilities; and

(c) The Offeror will include a certification substantially the same as this certification, including this paragraph (c), in every nonexempt subcontract.

19. HAZARDOUS MATERIAL IDENTIFICATION AND MATERIAL SAFETY DATA (NOV 1991 (FAR 52.223-03)

(a) "Hazardous material", as used in this clause, includes any material defined as hazardous under the latest version of Federal Standard No. 313 (including revisions adopted during the term of the contract).

(b) The offeror must list any hazardous material, as defined in paragraph (a) of this clause, to be delivered under this contract. The hazardous material shall be properly identified and include any applicable identification number, such as National Stock Number or Special Item Number. This information shall also be included on the Material Safety Data Sheet submitted under this contract.

Material (If none, insert "None")	Identification No.
NONE	

(c) The apparently successful offeror, by acceptance of the contract, certifies that the list in paragraph (b) of this clause is complete. This list must be updated during performance of the contract whenever the Contractor determines that any other material to be delivered under this contract is hazardous.

(d) The apparently successful offeror agrees to submit, for each item as required prior to award, a Material Safety Data Sheet, meeting the requirements of 29 CFR 1910.1200(g) and the latest version of Federal Standard No. 313, for all hazardous material identified in paragraph (b) of this clause. Data shall be submitted in accordance with Federal Standard No. 313, whether or not the apparently successful offeror is the actual manufacturer of these items. Failure to submit the Material Safety Data Sheet prior to award may result in the apparently successful offeror being considered nonresponsible and ineligible for award.

(e) If, after award, there is a change in the composition of the item(s) or a revision to Federal Standard No. 313, which renders incomplete or inaccurate the data submitted under paragraph (d) of this clause or the certification submitted under paragraph (c) of this clause, the Contractor shall promptly notify the Contracting Officer and resubmit the data.

(f) Neither the requirements of this clause nor any act or failure to act by the Government shall relieve the Contractor of any responsibility or liability for the safety of Government, Contractor, or subcontractor personnel or property.

(g) Nothing contained in this clause shall relieve the Contractor from complying with applicable Federal, State, and local laws, codes, ordinances, and regulations (including the obtaining of licenses and permits) in connection with hazardous material.

(h) The Government's rights in data furnished under this contract with respect to hazardous material are as follows:

(1) To use, duplicate and disclose any data to which this clause is applicable. The purposes of this right are to-

(i) Apprise personnel of the hazards to which they may be exposed in using, handling, packaging, transporting, or disposing of hazardous materials;
(ii) Obtain medical treatment for those affected by the materials; and
(iii) Have others use, duplicate, and disclose the data for Government for these purposes.

(2) To use, duplicate, and disclose data furnished under this clause, in accordance with subparagraph (h)(1) of this clause, in precedence over any other clause of this contract providing for rights in data.

(3) The Government is not precluded from using similar or identical data acquired from other sources.

20. CERTIFICATION REGARDING A DRUG-FREE WORKPLACE (Jul 1990)(FAR 52.223-05)

(a) Definitions. as used in this provision, "Controlled substance" means a controlled substance in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812) and as further defined in regulation at 21 CFR 1308.11 - 1308.15.

"Conviction" means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

"Criminal drug statue" means a Federal or non-Federal criminal statue involving the manufacture, distribution. dispensing, possession or use of any controlled substance.

"Drug-free workplace" means the site(s) for the performance of work done by the Contractor in connections with a specific contract at which employees of the Contractor are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

"Employee" means an employee of a Contractor directly engaged in the performance of work under a Government contract. "Directly engaged" is defined to include all direct costs employees and any other Contractor employee who has other than a minimal impact or involvement in contract performance.

"Individual" means an offeror/contractor that has not more than one employee including the offeror/contractor.

(b) By submission of its offer, the offeror, if other than an individual, who is making an offer that equals or exceeds $25,000, certifies and agrees that, with respect to all employees of the offeror to be employed under a contract resulting from this solicitation, it will - no later than 30 calendar days after contract award (unless a longer period is agreed to in writing), for contracts of 30 calendar days or more performance duration, or as soon as possible for contracts of less than 30 calendar days performance duration; but in any case, by a date prior to when performance is expected to be completed -

(1) Publish a statement notifying such employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the Contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibit;

(2) Establish an ongoing drug-free awareness program to inform such employees about -

(i) The dangers of drug abuse in the workplace;

(ii) The Contractor's policy of maintaining a drug-free workplace;

(iii) Any available drug counseling, rehabilitation, and employee assistance programs; and

(vi) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(3) Provide all employees engaged in performance of the contract with a copy of the statement required by subparagraph (b)(1) of this provision;

(4) Notify such employees in writing in the statement required by subparagraph (b)(1) of this provision that, as a condition of continued employment on the contract resulting from this solicitation, the employee will -

[see next page]

(i) Abide by the terms of the statement; and
(ii) Notify the employer in writing of the employee's conviction under a criminal drug statute for a violation occurring in the workplace no later than 5 calendar days after such conviction;

(5) Notify the Contracting Officer in writing within 10 calendar days after receiving notice under subdivision (b)(4)(ii) of this provision, from an employee or otherwise receiving actual notice of such conviction. The notice shall include the position title of the employee; and

(6) Within 30 calendar days after receiving notice under subdivision (b)(4)(ii) of this provision of a conviction, take one of the following actions with respect to any employee who is convicted of a drug abuse violation occurring in the work place:

(i) Take appropriate personnel action against such employee, up to and including termination ; or
(ii) Require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(7) Make a good faith effort to maintain a drug-free workplace through implementation of subparagraphs (b)(1) through (b)(6) of this provision.

(c) By submission of its offer, the offeror, if an individual work is making an offer of any dollar value, certifies and agrees that the offeror will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in the performance of the contract resulting from this solicitation.

(d) Failure of the offeror to provide the certification required by paragraphs (b) or (c) of this provision, renders the offeror unqualified and ineligible for award. (See FAR 9.204-1(g) and 19.602-1(a)(2)(i).)

(e) In addition to other remedies available to the Government, the certification in paragraphs (b) or (c) of this provision concerns a matter within the jurisdiction of an agency of the United States and the making of a false, fictitious, or fraudulent certification may render the maker subject to prosecution under Title 18, United States Code, Section 1001.

[end of clause]

21. CERTIFICATION OF TOXIC CHEMICAL RELEASE REPORTING (OCT 1995) (FAR 52.223-13)(Applicable to Contracts in excess of $100,000)

(a) The offeror, by signing this offer, certifies that
(NOTE: The offeror must check the appropriate box(es).)

[ ] (1) To the best of its knowledge and belief, it is not subject to the filing and reporting requirements described in Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) sections 313(a) and (g) and Pollution Prevention Act of 1990 (PPA) section 6607 because none of its owned or operated facilities to be used in the performance of this contract currently-

[ ] (i) Manufacture, process or otherwise use any toxic chemicals listed under section 313(c) of EPCRA, 42 U.S.C. 11023(c).

[ ] (ii) Have 10 or more full-time employees as specified in Section 313(b)(1)(A) of EPCRA, 42 U.S.C. 11023(B)(1)(A).

[ ] (iii) Meet the reporting thresholds of toxic chemicals established under section 313(f) of EPCRA, 42 U.S.C. 11023(f) including the alternate thresholds at 40 CFR 372.27, provided an appropriate certification form has been field with EPA).

[ ] (iv) Fall within Standard Industrial Classification Code (SIC) designations 20 through 39 as set forth in FAR section 19.102.

[ ] (2) If awarded a contract resulting from this solicitation, its owned or operated facilities to be used in the performance of this contract unless otherwise exempt, will file and continue to file for the lief of the contract the Toxic Chemical Release Inventory Form (Form R) as described in EPCRA sections 313(a) and (g) and PPA section 6607 (42 U.S.C. 13106).

(b) Submission of this certification is a prerequisite for making or entering into this contract imposed by Executive Order 12969, August 8, 1995 (60 FR 40989-40992).

22. COST ACCOUNTING STANDARDS NOTICES AND CERTIFICATION (NOV 1993) (FAR 52.230-01)

NOTE: This notice does not apply to small businesses or foreign governments. This notice is in three parts, identified by Roman numerals I through III.

Offerors shall examine each part and provide the requested information in order to determine Cost Accounting Standards (CAS) requirements applicable to any resultant contract.

I. DISCLOSURE STATEMENT-COST ACCOUNTING PRACTICES AND CERTIFICATION

(a) Any contract in excess of $500,000 resulting from this solicitation, except contracts in which the price negotiated is based on (1) established catalog or market prices of commercial items sold in substantial quantities to the general public, or (2) prices set by law or regulation, will be subject to the requirements of 48 CFR, Parts 9903 and 9904, except for those contracts which are exempt as specified in 48 CFR, Subpart 9903.201-1.

(b) Any offeror submitting a proposal which, if accepted, will result in a contract subject to the requirements of 48 CFR, Parts 9903 and 9904 must, as a condition of contracting, submit a Disclosure Statement as required by 48 CFR, Subpart 9903.202. The Disclosure Statement must be submitted as a part of the offeror's proposal under this solicitation unless the offeror has already submitted a Disclosure Statement disclosing the practices used in connection with the pricing of this proposal. If an applicable Disclosure Statement has already been submitted, the offeror may satisfy the requirement for submission by providing the information requested in paragraph (c) of Part I of this provision.

CAUTION: In the absence of specific regulations or agreement, a practice disclosed in a Disclosure Statement shall not, by virtue of such disclosure, be deemed to be a proper, approved, or agreed-to practice for pricing proposals or accumulating and reporting contract performance cost data.

(c) Check the appropriate box below:

[ ] (1) Certificate of Concurrent Submission of Disclosure Statement.

The offeror hereby certifies that, as a part of the offer, copies of the Disclosure Statement have been submitted as follows: (i) Original and one copy to the cognizant Administrative Contracting Officer (ACO), and (ii) one copy to the cognizant contract auditor.

(Disclosure must be on Form No. CASB DS-1. Forms may be obtained from the cognizant ACO or from the looseleaf version of the Federal Acquisition Regulation.)
Date of Disclosure Statement:_____
Name and Address of Cognizant ACO where filed:_____
_____

The offeror further certifies that practices used in estimating costs in pricing this proposal are consistent with the cost accounting practices disclosed in the Disclosure Statement.

[X] (2) Certificate of Previously Submitted Disclosure Statement.

The offeror hereby certifies that Disclosure Statement was filed as follows: See attached page 25a

Date of Disclosure Statement:_____
Name and Address of Cognizant ACO where filed:_____

The offeror further certifies that the practices used in estimating costs in pricing this proposal are consistent with the cost accounting practices disclosed in the applicable disclosure statement.

ATTACHMENT TO
STANDARD FORM 1411

Reference XX (Government Property, Box 10)

Explanation required if checked Yes.

Reference XX (Same/Similar Items, Box 12)

Explanation required if checked Yes.

Reference XX (Proposal Consistent with Estimating System, Box 13)

Explanation required if checked No.

Reference XX (CASB Regulation, Box 14A)

Explanation required if checked No.

Reference XX (CASB Disclosure Statement, Box 14B)

The Alliant Techsystems Inc. Aerospace Systems Group Cost Accounting Standards Board Disclosure Statement submittal is comprised of the following reporting units and parts; status for each is provided below:

Reporting Unit and Disclosure Statement Part	Latest Revision/Date	Submitted To:
Bacchus Works Parts I-VII	Amendment 1 dated 21 August 1995	Defense Contract Management Office (DCMO) DCMDC-RUA/ACO P.O. Box 37, Magna, Utah 84044 (801) 251-1209

Bacchus Plant has submitted to the above ACO office Disclosure Statement Amendment #1, this document reflects the acquisition of Hercules Aerospace by Alliant Techsystems Inc.

Corporate Home Office Part VIII	1 Jan 1991 w/changes through 1 Apr 1992	Defense Plant Representative Office Alliant Techsystems Inc. Location MN11-2741 600 Second Street, N.E. Hopkins, MN 55343-8384

A revised Part VIII has been submitted to DPRO-Minneapolis as of 5 April 1995 which reflects the acquisition of Hercules Aerospace by Alliant Techsystems Inc.

Reference XX (Disclosure Statement/CAS Noncompliance, Box 14C)
Explanation required if checked Yes.

Reference XX (Proposal Consistent with CAS Requirements, Box 14D)

Explanation required if checked Yes.

Last Revised 9/5/95

[ ] (3) Certificate of Monetary Exemption.

The offeror hereby certifies that the offeror, together with all divisions, subsidiaries, and affiliates under common control, did not receive net awards of negotiated prime contracts and subcontracts subject to CAS totaling more than $25 million (of which at least one award exceeded $1 million) in the cost accounting period immediately preceding the period in which this proposal was submitted. The offeror further certifies that if such status changes before an ward resulting from this proposal, the offeror will advise the Contracting Officer immediately.

[ ] (4) Certificate of Interim Exemption.

The offeror hereby certifies that (i) the offeror first exceeded the monetary exemption for disclosure, as defined in (3) of this subsection, in the cost accounting period immediately preceding the period in which this offer was submitted and (ii) in accordance with 48 CFR, Subpart 9903.202-1, the offeror is not yet required to submit a Disclosure Statement. The offeror further certifies that if an award resulting from this proposal has not been made within 90 days after the end of that period, the offeror will immediately submit a revised certificate to the Contracting Officer, in the form specified under subparagraph (c)(1) or (c)(2) of Part I of this provision, as appropriate, to verify submission of a completed Disclosure Statement.

CAUTION: Offerors currently required to disclose because they were awarded a CAS-covered price contract or subcontract of $25 million or more in the current cost accounting period may not claim this exemption (4). Further, the exemption applies only in connection with proposals submitted before expiration of the 90-day period following the cost accounting period in which the monetary exemption was exceeded.

II. COST ACCOUNTING STANDARDS-ELIGIBILITY FOR MODIFIED CONTRACT COVERAGE

If the offeror is eligible to use the modified provisions of 48 CFR Subpart 9903.201-2(b) and elects to do so, the offeror shall indicate by checking the box below. Checking the box below shall mean that the resultant contract is subject to the Disclosure and Consistency of Cost Accounting Practices clause in lieu of the Cost Accounting Standards clause.

The offeror hereby claims an exemption from the Cost Accounting Standards clause under the provisions of 48 CFR Subpart 9903.201-2(b) and certifies that the offeror is eligible for use of the Disclosure and Consistency of Cost Accounting Practices clause because during the cost accounting period immediately preceding the period in which this proposal was submitted, the offeror received less than $25 million in awards of CAS-covered prime contracts and subcontracts, or the offeror did not receive a single CAS-covered award exceeding $1 million. The offeror further certifies that if such status changes

before an award resulting from this proposal, the offeror will advise the Contracting Officer immediately.

CAUTION: An offeror may not claim the above eligibility for modified contract coverage if this proposal is expected to result in the award of a CAS-covered contract of $25 million or more or if during its current cost accounting period, the offeror has been awarded a single CAS-covered prime contract or subcontract of $25 million or more.

III. ADDITIONAL COST ACCOUNTING STANDARDS APPLICABLE TO EXISTING CONTRACTS

The offeror shall indicate below whether award of the contemplated contract would, in accordance with subparagraph (a)(3) of the Cost Accounting Standards clause, require a change in established cost accounting practices affecting existing contracts and subcontracts.

[ ] Yes [X] No

23. INTENT TO FURNISH PRECIOUS METALS AS GOVERNMENT-FURNISHED MATERIAL (DEC 1991) 252.208-7000 (Applicable if the item procured requires precious metal, as defined in *DOD FAR Supp. 208.7301*, in its manufacture)

(a) The Government intends to furnish precious metals required in the manufacture of items to be delivered under the contract if the Contracting Officer determines it to be in the Government's best interest. The use of Government-furnished silver is mandatory when the quantity required is one hundred troy ounces or more. The precious metal(s) will be furnished pursuant to the Government Furnished Property clause of the contract.

(b) The Offeror shall cite the type (silver, gold, platinum, palladium, iridium, rhodium, and ruthenium) and quantity in whole troy ounces of precious metals required in the performance of this contract (including precious metals required for any first article or production sample), and shall specify the national stock number (NSN) and nomenclature, if known, of the deliverable item requiring precious metals.

[see next page]

Precious Metal*	Quantity	Deliverable Item (NSN and Nomenclature)

*If platinum or palladium, specify whether sponge or granules are required.

(c) Offerors shall submit two prices for each deliverable item which contains precious metals--one based on the Government furnishing precious metals, and one based on the Contractor furnishing precious metals. Award will be made on the basis which is in the best interest of the Government.

(d) The Contractor agrees to insert this clause, including this paragraph (d), in solicitations for subcontracts and purchase orders issued in performance of this contract, unless the Contractor knows that the item being purchased contains no precious metals.

(End of clause)

24. SMALL DISADVANTAGED BUSINESS CONCERN REPRESENTATION (DoD CONTRACTS) (APR 1994) (DoD FAR Supp. 252.219-7000)

(a) Definition.

"Small disadvantaged business concern," as used in this provision, means a small business concern, owned and controlled by individuals who are both socially and economically disadvantaged, as defined by the Small Business Administration at 13 CFR Part 124, the majority of earnings of which directly accrue to such individuals. This term also means a small business concern owned and controlled by an economically disadvantaged Indian tribe or Native Hawaiian organization which meets the requirements of 13 CFR 124.112 or 13 CFR 124.113, respectively. In general, 13 CFR Part 124 describes a small disadvantaged business concern as a small business concern --

(1) Which is at least 51 percent unconditionally owned by one or more socially and economically disadvantaged individuals; or

(2) In the case of any publicly owned business, at least 51 percent of the voting stock is unconditionally owned by one or more socially and economically disadvantaged individuals; and

(3) Whose management and daily business operations are controlled by one or more such individuals.

(b) Representations.
Check the category in which your ownership falls --

_____ Subcontinent Asian (Asian-Indian) American (U.S. citizen with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, or Nepal)

_____ Asian-Pacific American (U.S. citizen with origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, U.S. Trust Territory of the Pacific Islands Republic of Palau), the Northern Mariana Islands, Laos, Kampuchea (Cambodia), Taiwan, Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Republic of the Marshall Islands, or the Federated States of Micronesia)

_____ Black American (U.S. citizen)

_____ Hispanic American (U.S. citizen with origins from South America, Central America, Mexico, Cuba, the Dominican Republic, Puerto Rico, Spain, or Portugal)

_____ Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians, including Indian tribes or Native Hawaiian organizations)

_____ Individual/concern, other than one of the preceding, currently certified for participation in the Minority Small Business and Capital Ownership Development Program under Section 8(a) of the Small Business Act

_____ Other

(c) Certifications.
Complete the following --

(1) The offeror is_____ is not __X__ a small disadvantaged business concern.

(2) The Small Business Administration (SBA) has _____ has not ____made a determination concerning the offeror's status as a small disadvantaged business concern. If the SBA has made a determination, the date of the determination was _____ and the offeror --

____ Was found by SBA to be socially and economically disadvantaged and no circumstances have changed to vary that determination.

____ Was found by SBA not to be socially and economically disadvantaged but circumstances which caused the determination have changed.

(d) Penalties and Remedies.
Anyone who misrepresents the status of a concern as a small disadvantaged business for the purpose of securing a contract or subcontract shall --

(1) Be punished by imposition of a fine, imprisonment, or both;

(2) Be subject to administrative remedies, including suspension and debarment; and

(3) Be ineligible for participation in programs conducted under authority of the Small Business Act.

25. BUY AMERICAN ACT - BALANCE OF PAYMENTS PROGRAM CERTIFICATE (DEC 1991) (DoD FAR Supp. 252.225-7000) (Applicable to contracts for supplies or services which require the furnishing of supplies)

(a) Definitions.
"Domestic end product," "qualifying country," "qualifying country end product," and "nonqualifying country end product" have the meanings given in the Buy American Act and Balance of Payments Program clause of this solicitation.

(b) Evaluation.
Offers will be evaluated by giving preference to domestic end products and qualifying country end products over nonqualifying country end products.

(c) Certifications.

(1) The Offeror certifies that--
(i) Each end product, except those listed in paragraphs (c)(2) or (3) of this clause, is a domestic end product; and

(ii) Components of unknown origin are considered to have been mined, produced, or manufactured outside the United States or a qualifying country.

(2) The Offeror certifies that the following end products are qualifying country end products:

[see next page]

Qualifying Country End Products

Line Item Number	Country of Origin
_____	_____

(List only qualifying country end products.)

(3) The Offeror certifies that the following end products are nonqualifying country end products:

Nonqualifying Country End Products

Line Item Number	Country of Origin (If known)
_____	_____

(End of provision)

26. INFORMATION FOR DUTY-FREE ENTRY EVALUATION (AUG 1992) (DoD FAR Supp. 252.225-7003) (Applicable to contracts for supplies or services which require the furnishing of supplies)

(a) Is the offer based on furnishing any supplies (i.e., end items, components, or material) of foreign origin other than those for which duty-free entry is to be accorded pursuant to the Duty-Free Entry--Qualifying Country End Products and Supplies clause of this solicitation?

Yes ( ) No (X)

(b) If the answer in paragraph (a) is yes, answer the following questions:

(1) Are such foreign supplies now in the United States?

Yes ( ) No ( )

(2) Has the duty on such foreign supplies been paid?

Yes ( ) No ( )

(3) If the answer to paragraph (b)(2) is no, what amount is included in the offer to cover such duty?
$_____

(c) If the duty has not been paid, the Government may elect to make award on a duty-free basis. If so, the offered price

will be reduced in the contract award by the amount specified in paragraph (b)(3). The Offeror agrees to identify, at the request of the Contracting Officer, the foreign supplies which are subject to duty-free entry.

(d) Offers will be evaluated on a duty included basis except to the extent that--

(1) The supplies are qualifying country end products as defined in the Buy American Act and Balance of Payments Program clause of this solicitation; or

(2) The duty-free price is specified for use in the evaluation procedure.

(End of provision)

27. REPRESENTATION OF EXTENT OF TRANSPORTATION BY SEA (AUG 1992) (DoD FAR Supp. 252.247-7022)

(a) The Offeror shall indicate by checking the appropriate blank in paragraph (b) of this provision whether transportation of supplies by sea is anticipated under the resultant contract. The term "supplies" is defined in the Transportation of Supplies by Sea clause of this solicitation.

(b) Representation.
The Offeror represents that it--

_____ Does anticipate that supplies will be transported by sea in the performance of any contract or subcontract resulting from this solicitation.

__X__ Does not anticipate that supplies will be transported by sea in the performance of any contract or subcontract resulting from this solicitation.

(c) Any contract resulting from this solicitation will include the Transportation of Supplies by Sea clause. If the Offeror represents that it will not use ocean transportation, the resulting contract will also include the Defense FAR Supplement clause at 252.247-7024, Notification of Transportation of Supplies by Sea.

(End of provision)

23. ACCESS TO VESSELS BY NON-U.S. CITIZENS (ACP CERTIFICATION) (DFARS 252.222-7004)(Deviation) (DFAR Staff Case 86-907 - 24 May 1988) (Applicable to contracts which include the special provision entitled "Access to Vessels by Non-U.S. citizens")

(a) The bidder or offeror, in the performance of any contract and/or job order resulting from this solicitation _____ intends, _____ does not intend (check applicable line) to employ non-U.S. citizens in the performance of work that requires access to naval vessels, work sites and adjacent areas when such vessels are under construction, conversion, overhaul or repair.

(b) If the bidder or offeror, "intends" in paragraph (a) above, the bidder shall insert in the spaces provided below, the required information:

(c) Whether or not the bidder or offeror intends to employ non-U.S. citizens, the actual access of non-U.S. citizens to naval vessels is subject to the requirements of the clause entitled "ACCESS TO VESSELS BY NON-U.S. CITIZENS".

ACCESS CONTROL PLAN (ACP)

Approved ACP No. _____

If no approved ACP, indicate below, actions taken or anticipated relative to ACP submission to applicable Contract Administration Office (See NAVSEA Instruction 5500.3).

[end of clause]

Contractor: Alliant Techsystems Inc.

By: J. W. Christensen Jared W. Christensen

Title: Contract Administrator

Date: 7-31-96

SECTION L - INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFEROR

This solicitation incorporates the following solicitation provisions by reference, with the same force and effect as if they were given in full text. Upon request the Contracting Officer will make their full text available.

Federal Acquisition Regulation (FAR) (48 CFR Chapter 1) Provisions and DOD FAR Supplement (48 CFR Chapter 2) Provisions

Provision No.	Title and Date	Provision Text
*1.	Organizational Conflicts of Interest Certificate-Marketing Consultants (Oct 1995)	52.209-07
2.	Restrictions on Disclosure and Use of Data (Apr 1984)	52.215-12
3.	Integrity of Unit Prices (Oct 1995) Alternate I (Apr 1991)	52.215-26
4.	Utilization of Small, Small Disadvantaged and Women Owned Business Concerns (Oct 1995)	52.219-08
**5.	Small Business, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (Oct 1995)	52.219-09
**6.	Liquidated Damages-Subcontracting Plan (Oct 1995)	52.219-16
7.	Preaward On-Site Equal Opportunity Compliance Review (Apr 1984)	52.222-24
8.	Utilization of Indian Organizations and Indian-Owned Economic Enterprises (Aug 1991)	52.226-01
9.	Site Visit (Apr 1984)	52.237-01
**10.	Small Business and Small Disadvantaged Business Subcontracting Plan (DoD Contracts) (Nov 1995)	252.219-7003
**11.	Incentive for Subcontracting with Small Businesses, Small Disadvantaged Businesses, Historically Black Colleges and Universities, and Minority Institutions (Nov 1995) (Insert "1%" in paragraph (a))	252.219-7005
12.	Secondary Arab Boycott of Israel (Jun 1992)	252.225-7031
13.	Identification of Uncompensated Overtime (Dec 1991) (Applicable to level-of-effort contracts)	252.237-7019

*Applicable when the amount of this contract exceeds $200,000.
**Applicable when the amount of this contract exceeds $500,000.

(Underlining denotes changes made in this edition)

ADDENDUM D – October 26, 2009 Hearing Transcript

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY BOARD OF EQUALIZATION, Plaintiff, vs. ALLIANT TECHSYSTEMS, et al. Defendant.	Case No. 030917933

Hearing
Electronically Recorded on
October 26, 2009

BEFORE: THE HONORABLE JON M. MEMMOTT
Third District Court Judge

APPEARANCES

For the Plaintiff:

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P R O C E E D I N G S

(Electronically recorded on October 26, 2009)

COURT BAILIFF: This Court is again in session. Please be seated.

THE COURT: Good afternoon. We're here in the matter of Alliant Techsystems, Inc. vs. Salt Lake County Board of Equalization, Utah State Tax Commission and Granite School District. For the parties, we don't have a video anymore, we have an audio. So I need you to identify yourselves on the record so they can hear your voice and so when they know you speak they know who it is. So I need everybody to identify themselves separately as we go through.

MR. MCCARREY: Thank you, your Honor. John McCarrey, assistant attorney general here on behalf of the Utah State Tax Commission.

THE COURT: Thank you, Mr. McCarrey.

MR. LIND: Laron Lind, assistant attorney general here on behalf of the Utah State Tax Commission.

THE COURT: Thank you.

MS. SLOAN: Mary Ellen Sloan, Salt Lake County District Attorney on behalf of the Salt Lake County Board of Equalization.

THE COURT: Thank you.

MR. WRIGHT: Your Honor, Kelly Wright with the Salt Lake County District Attorney's Office on behalf of the County.

THE COURT: Thank you.

MR. CRAPO: Good afternoon, your Honor. My name is David Crapo. I'm with the law firm of Wood Crapo here in Salt Lake City representing Alliant Tech Systems. Observing from our office is Ms. Pamela Hunsaker.

THE COURT: Thank you. Now since we have cross motions for summary judgment, I thought I would allow Alliant Techsystems to go first since really the burden of proof of theirs ultimately in this of proving the inapplicability or exemption from the tax. So Mr. Crapo, you may proceed.

MR. CRAPO: Thank you, your Honor. There is an outstanding motion that was filed by the counties on the motion to strike portions of the affidavit of Mr. Abpanalp.

THE COURT: Do you want to deal with that first? We can.

MR. WRIGHT: That's fine, your Honor.

THE COURT: Okay.

MR. CRAPO: I believe that's the County's motion, so --

THE COURT: Yes. Go ahead.

MR. WRIGHT: If you have any questions, I'm sure the Court has reviewed that.

THE COURT: I have.

MR. WRIGHT: The essence of our argument is that to parole evidence we should look to the documents themselves to establish a relationship. Our concern was that we get carried away with trying to characterize the documents, the four corners

and what the relationships are, and those are really contained within those documents.

We're criticized because we had included evidence actually of Mr. Foote -- Jeff Foote. The distinguishing point that I would make is that that testimony was actually -- not only was it sworn, but it was subject to direct and cross examination, was actually part of the hearing, where the affidavit that we have is just unilateral. It hasn't had a chance -- nobody has had a chance to examine and cross examine the individual.

We believe, your Honor, that basically if the Court were to stay within the four corners of the documents and that the facts that we have that are presented there within the documents, that that's the appropriate inquiry by this Court. So to the extent that we have representation outside of the four corners of the documents, we would ask that that be stricken.

THE COURT: What specific representations do you believe are outside of the four corners of the document? I mean as I went through -- and we didn't go through -- I didn't go through every one, but most of them seemed consistent with the -- very few things seemed inconsistent from his statement --

MR. WRIGHT: I think that's correct.

THE COURT: -- that it was just --

MR. WRIGHT: I think that's correct, your Honor. We just wanted to make sure on the record that what we look at is the documents themselves.

THE COURT: But are there specific statements that you believe in there that are outside -- that I specifically need to address? Again, just going through it generally it appeared that most of them were consistent with statements either you made or ATK made in their statement of facts as they went through. There were --

MR. WRIGHT: I understand.

THE COURT: I couldn't really find any that I thought were just really something that was in opposition or was new or different.

MR. WRIGHT: I'll tell you really the part that we're most concerned about is the characterization that the Navy, if you will, controls ATK.

THE COURT: Well, that characterization is -- yeah. That's an assumption that this Court is not going to be bound by. It's what his assumption is. I mean that's findings that I'm going to have to make.

MR. WRIGHT: And I concur with that, your Honor. That probably is -- that characterization, we believe it does ultimately go to an issue that may or may not be an ultimate issue of fact as to it's relevant, but that's our primary concern.

THE COURT: Okay.

MR. WRIGHT: Otherwise, I concur with your assessment.

THE COURT: Okay. Thank you.

MR. CRAPO: Your Honor, in response on the motion to strike, we don't believe the counties have identified anything that is inconsistent with the actual documents themselves. Mr. Abpanalp did not testify in his affidavit that the Navy controls. He said the contract controls, and he talked about specific limitations identified in the contract. I believe the counties have the burden of coming forth and specifically identifying where it's contrary and providing evidence where it's contrary. So I believe the Court should properly deny --

THE COURT: How do you pronounce his name again?

MR. CRAPO: He says Abpanalp.

THE COURT: Abpanalp, okay.

MR. CRAPO: The other item that was raised by the counties is Mr. Foote's testimony. We did not criticize the counties for inclusion of the testimony. We just criticized the proper context in which it was being stated and said that they needed to give the entire statement rather than just selective portions.

Your Honor, I don't believe there's any merit to the County's motion to strike. They have not come forth with the requisite evidence to be able to rebut it, and we'd ask that you deny their motion to strike in toto.

THE COURT: Okay.

MR. WRIGHT: May I respond very quickly?

THE COURT: Yes.

MR. WRIGHT: Do you want me up here where --

THE COURT: Either way. You're on the mic either way.

MR. WRIGHT: Just a couple of points.

THE COURT: Yes.

MR. WRIGHT: Our motion to strike does go in detail and talks about that. It does bring up the issue of law which is what we're raising. I'm not sure what Counsel expects with additional evidence, because that's the whole point. We have the documents themselves. They speak for themselves. So we believe that we have met the burden, that that is contained within our motion to strike, and the issue is an issue of law.

THE COURT: Thank you. I have reviewed this. I'm going to deny the motion to strike. However, in saying that, there are certain statements where I think that he does reach the limit of trying to interpret the law. Just so that it's clear that those statements or those conclusions he reached as the application of law are not binding on the Court, those findings of fact. So they are not binding.

The factual assertions he makes can stand for themselves. I don't think they're different than the statements that are in the findings of fact, but his assertions of what -- how that's applied or how to even interpret the contract are beyond what is appropriate for an affidavit. That's my role as the Court.

MR. WRIGHT: Thank you, your Honor.

THE COURT: Okay.

MR. CRAPO: Might I proceed, then?

THE COURT: Yes, you may.

MR. CRAPO: Thank you, your Honor. Your Honor, I'll try to address just the key points that have been raised in the briefing because you have significant and substantial briefing, and I'd be happy to answer any questions you may have.

THE COURT: I probably will as we go through, yes.

MR. CRAPO: We believe that this case is really a statutory construction case, and it's based on the plain language of the statute. I have placed on the board in front of me the applicable statute, and if you'd like, I have a handout that is that if you can't see that.

THE COURT: I have the statute here.

MR. CRAPO: Very good. Your Honor, the statute at issue is Title 59-4-101, which is the privilege tax statute in the State of Utah. We are dealing with the exemption provisions which are found in subparagraph 3, and then there's (a) through (g) currently that are exemptions.

We're going to be talking about (e). We believe that the plain language allows us -- this exemption -- and let me explain. If you look at the very first sentence of (e), "The use or possession of any lease, permit or easement, unless the lease, permit or easement entitles the lessee or permitee to exclusive possession or the premises to which the lease, permit or easement

relates." The language that we think we really need to focus on is any lease or permit or easement, and do we have exclusive possession. We believe we have a situation where we have a permit. We do not have exclusive possession; therefore, we're entitled to the exemption.

THE COURT: Okay. Let me stop you right there because I -- when I was legislative general Counsel, one of my responsibilities was drafting laws, and one of the laws -- the areas that I was responsible for was drafting tax laws. So I spent a number of years drafting some of the statutes we're talking about, and was involved in drafting them when I was legislative general Counsel.

One of the things that concerns me about the argument that you're making and I'd like you to address is the exemption itself. It says, "The use, possession of any lease." Okay. So you start out with a lease. With a lease you have certain property rights, and you've cited cases in which you say lease rights you have to have exclusive possession, and you cited cases which talk about a leasehold interest.

A permit interest is something less than a leasehold interest, by law. I mean you look at the cases and there weren't a lot of cases cited in permitees or licensees, which are analogous -- some. There were some cases addressed licensees, but that property (inaudible) by permitee or licensee is less than a lessee.

Then on the -- on the far end down there is somebody that has an easement, which is something less than a permitee or a licensee. Then the statute goes on to say that -- and so you have different classes, but then it says, "The lessee are permitted to exclusive permission of the premise to which the lease permit or easement relates."

So you could have an exclusive possession within the rights of a leasehold. You could have exclusive possession within the rights of a permitee, and you could have exclusive possession in the rights of an easement, and they may not be the same as exclusive possession period. It seems that the statute makes the distinction.

One other thing that's troubled me about the argument you've presented, and using lease all the time is you say that this exclusive possession we have to be granted is exclusive possession period rather than exclusive possession limited to which the permit relates. So I'd like you to address that and talk about that, because there seems to be -- either that or the words don't mean anything. I mean there's no use to have all those other words and all those other types of possessory interests unless they mean something.

MR. CRAPO: Right, thank you. I believe you've raised the point very well. What you're really fccusing then is if you have a permit and it's exclusive only for the range of the permit itself, then what is left over for the premises.

THE COURT: Yeah. For example, in the history -- the discussion where you could grant a license or a permit into a mine or what's later coming with the Great Salt Lake. You can give somebody the right to mine gold. You can give somebody the right to mine silver. You can give somebody else -- and so they all have for purposes of taxation exclusive possession to do what they're going to do with the same set of property, even if you have more than one person acting on the property.

That seems to bear out with the later language in dealing with the Great Salt Lake, that there appears to be an intent to do that, either that or it appears to me that some of that language just doesn't need to be there, and that's not the way statutes are usually interpreted.

MR. CRAPO: Thank you. If I might be able to try to explain it, your Honor.

THE COURT: Okay.

MR. CRAPO: The way that I believe that you're interpreting it with a lease, a permit and an easement, you take the permit and you say it has lesser geographical boundaries or lesser rights on a particular area. If that is true under the statute, you're only entitled to tax the beneficial use of the permit as it applies to those premises, not to the entire land or not to the entire property at issue. If you allow the tax to go beyond the restrictions of the permit, then you're going to impose tax on the United States government who has the remainder

in this particular case.

If I might explain sentences 1 and 2 as it relates to the language, you have sentence 1, which I believe is fairly unambiguous and straight on its face.

THE COURT: Uh-huh.

MR. CRAPO: The question then becomes sentence 2, and we've had discussion back and forth in the briefing what does that really mean.

THE COURT: Uh-huh.

MR. CRAPO: I believe in looking at the bills and the language that was drafted, it probably appears -- and I need to correct myself in the first briefing -- that it appears that the legislature is trying to tax the mineral rights but not the Great Salt Lake brines.

THE COURT: Uh-huh.

MR. CRAPO: What becomes interesting is why did they leave out exclusive because that was in the original bill, and they struck it on the legislative floor so it only said possession.

Then the question becomes at the end of the sentence where it talks about having different holders of mineral rights on the same land, but it talks the value of the premises rather than in the same lands. According to my understanding, when you have, for example, a co-lease, you may have -- or even an oil lease on a 10 acre parcel, you'll give a two to three acre lease

or mineral lease to extract. The next lease that will be given on that land won't sit right on top of that, will be adjacent to. So you'll have three acres of premises, three acres of premises, three acres of premises for three different lien holders on a 10 acre parcel owned by the owner.

Now if the County's interpretation is correct where you get to tax the entire parcel for each of those three, you're going to get 300 percent tax because you're going to get a full tax from leaseholder or permit holder No. 1, lease or permit holder No. 2 and No. 3, which is illogical and can't work.

So the restriction, I believe, if it's to be read congruent with the first sentence is saying the premises is what that they are allowed to tax, even though there may be others that have a right to use the same lands with the premises immediately adjacent thereto. So I think that would be the interpretation that would keep this consistent for all the language.

Now you say, "Well, what about a permit," because you've cited the Keller case and you've cited a few others that say there's always going to be some sort of a restriction. I recognize that. I believe there is some sort of a restriction. So you're then faced with an interpretation to say does it mean exclusive as to just third persons or third parties or others, or does exclusive also include the owner.

The counties site the Bullough (phonetic) case, which is

the 1920 sheep grazing case. In that one you have a person asking for actually a permit -- grazing permit, and there were two or three others that had permits as well on that same property, I believe 1500 head of sheep to 4300 head of sheep.

So the question is is this exclusive. The County interprets that to say, "Well, you just look at who the other parties are and you don't look at the owner. If there's other parties, then that's how it's exclusive." I don't think that is a fair interpretation.

What if you had the owner in Bullough who says, "I want to run my 4300 head of sheep on my own property, but I want to give you a permit to run your 1500 head on my property as well." Does that mean that that new person, because he's exclusive as to anyone else except for the owner who runs his 4300 head that he says, "Oh, you're exclusive now. Therefore, you pay a full property tax on my 5,000 acres of property, even though you're only running 1500 head." I don't believe so.

So the owner's rights retained have to be viewed as to say do you really have exclusive possession and control of the property that is being subject to tax. In this particular case ATK does have certain possession rights under a permit, certain other rights, but it does not have possession and control of the entire Nyroit (phonetic) property without intervention from the United States government.

For the County to come in and say, "We're going to tax

the entire amount," would impose a tax on the United States government. That's why we believe you have to look at the premises that are being subject to tax when you look at the language on this.

I believe that if you look at the cases that we also cited you for Exxon Mobil, that if you have the plain language that is there, you need to interpret it saying any lease and not exclusive possession, and if for any reason you don't think it yields a result, you can't try to judicially carve that result, but you should rule on the plain language, and Exxon says, "Then the legislature will change it."

That's exactly what happened in County Board of Equalization vs. Evans and Sutherland, which was exemption (c) just above. Supreme Court applied the plain language and then said this is the way it will go, and the legislature can change it if they need to.

So your Honor, I think that answers the interpretation and keeps it consistent with the plain language when what we're looking at is it says any lease, and are we permitted exclusive possession. You look at Keller, we don't have exclusive possession. You look at Loyal Order of the Moose where the Supreme Court said, "We've got to look at the word exclusive," and it doesn't mean just primary. That means you have the exclusive control of this land. We don't. We may have limited rights. So I believe that answers the question.

The arguments from the counties are basically one, we don't have a permit is their first attack. I don't believe that is really with merit. Permit is defined as any rights to use or occupy, though without a leasehold interest. I think that's clearly what we have here. Their next attack was the exclusive possession language, and to say the third party versus the owner, and they don't want to allow the owner into that definition, which I already explained.

The next argument that they go to is the adjustum generis, which is saying you have to take the second sentence and read it to control the first sentence.

THE COURT: Well, I don't think you even need the second sentence to control the first.

MR. CRAPO: Well, your Honor, I believe --

THE COURT: I mean to me -- and I'm not sure you've answered my question completely -- that a permit interest or an easement -- and maybe my understanding with the tax commission is different. If somebody has an easement going through this property, are they taxed for the full value of the property or just the property that's within the easement?

MR. CRAPO: Your Honor, we would --

THE COURT: I mean I don't know. I mean how -- generally my understanding of easements, in cases I've had before, they're only taxed on the property within the boundaries of the easement. They're not taxed on the value of the full

property.

MR. CRAPO: And that's the way we would look at it. Your Honor, candidly, if the counties were only taxing a possessory interest, which ATK holds, we wouldn't have an argument, but they're taxing us as if we own the entire property.

THE COURT: No, no. They're taxing it on a value as if you owned the property. I mean -- and that's a big distinction under tax law. It doesn't have to be the same as an advolarm property tax. It's a use tax. It's a privilege tax.

You start out with the premise that it's taxed on this value, and then you can argue valuations. I mean you can argue, "Well, that's not an appropriate valuation," but that doesn't affect the constitution or legality of a tax. It's the premise to start. It's not the -- and it can be something -- a privilege tax or a use tax doesn't have to be the same as an advolarm property tax.

MR. CRAPO: Well, I believe that gets right into the case that we cite you from Colorado on the Nye case.

THE COURT: No, the Nye case is -- well, the Nye case is the Tenth Circuit -- or the Ninth Circuit. The Nye case -- it points out in the Nye case that the Tenth Circuit has a more restrictive reading than even the Colorado cases.

One thing that concerns me about the cases that you've cited to me, all of those -- Colorado, New Mexico, Nye case -- in every one of those cases, the United States government was the

principle party. The United States government is not a party here, and under Shelleby vs. Lore (phonetic) they set forth a three part test for standing to raise constitutional issues as supremacy clause.

MR. CRAPO: Right.

THE COURT: Under that it appears to me that ATK doesn't have standing to raise the issue of supremacy as applied to this statute because the second test is the impossibility of the right holders asserting their own constitutional rights, and it's clear from the other cases across the country that if the United States government wants to assert its rights, it clearly has the ability to do that. So there's no impossibility of the federal government asserting that right.

The third is the need to avoid delusion of third party's constitutional rights, which would result -- and again, if the United States wanted to do this -- and so it appears to me that as I have gone through and really looked at this that there really is a standing issue to raise that argument in this case, that it's the United States government that has to come in because every case that you have cited on the supremacy clause, the United States government is the party in interest and is the one bringing the claim, and it's exactly the same case as yours.

There are people there that are permitees that are on the ground doing it, doing everything, but it's the United States government that's challenging the County in all the cases

assessing, not the lessees or the person or the permitees or -- and they're the primary party bringing the claims, and so that issue is not raised. So I have a real question about standing to even raise the argument here.

MR. CRAPO: Your Honor, I'd respectfully disagree with that interpretation, and the reason being on standing is we are not bringing a claim asking for the refund for the United States. We are rather doing an interpretation of the statute to keep it constitutional.

THE COURT: Right, but that -- in every one of those cases that's what they were doing, asking for the constitutionality of the statute.

MR. CRAPO: Right. In those particular cases, though, your Honor, if you will look at County Board of Equalization, the Evans Sutherland case that's cited to you.

THE COURT: Uh-huh.

MR. CRAPO: In that particular case, the counties themselves raise constitutional issues on the interpretation of this very -- not (e), but subsection (c) of this very statute. The Utah Supreme Court had no hesitation in addressing those issues that were raised as constitutional questions for the privilege tax issue, even though the United States government was not a party in that particular case because they were interpreting the statute.

In that particular case even Ms. Sloan who is Counsel

here argued that case before the Utah Supreme Court, and asked them on discrimination against the United States government for equal protection, uniform application of laws. They did not use supremacy, but they used each of those items and due process, and the Supreme Court did not hesitate in allowing and interpreting those constitutional provisions as it applies to this statute.

I believe the standard is different in the State of Utah in trying to interpret a statute that once it's been raised, the Supreme Court will address those particular issues in the interpretive fashion to say would it cause this statute to be unconstitutional or not. We'd ask you to look at that case in relationship to Shelby -- Shelleby, excuse me.

The other point, your Honor, that I'd like to cover -- a couple of points that were raised by the counties that may have been issues for these. One is whether Thiokol applies or not. We do not believe it does apply. I might show you a slide -- a poster. On this particular poster, your Honor, the question was does the exemption as it currently read exist in 1959 as was the 1961 date for Thiokol, and we don't believe it did.

If you'll look at the original enacting language, it said no tax shall be implied, and what did it talk about, mineral or grazing leases only. I've italicized the language the County pointed out to you and said well, that's existed ever since day one, every iteration has existed. But what did it apply to?

The language, "Unless you have exclusive possession,"

only applied to mineral and grazing. In 1975 it was amended. Minerals were dropped out, and it applied to grazing only, and then you get that other language for minerals. In 1987 what did they do? They took grazing and put it at subparagraph (d) and sub -- which has no requirement of exclusive possession for grazing leases at that point, and then had subsection (d), which is our current language, and the only thing is any lease.

So your Honor, that actual provision of looking at any lease that does not give you exclusive possession was not even addressed or raised at the time of Thiokol back in 1961. So we think it's a different statute and a different time period. Because of that, we don't think that Thiokol is binding or really helpful for that matter in this particular case.

I believe the only other case that was cited by the State that was from Utah was ABCO, and in that particular case you had a lease. It doesn't really get to the exclusive possession issue that is raised in this particular matter. So really subsection (d) as it is in the current was never addressed or raised.

So your Honor, it really does come down to that first sentence of subsection (d) on how to interpret it. I see where you're coming from, but we honestly believe that the plain language states any lease or permit. We have a permit here to use.

I believe the facts show that we don't have unrestricted

rights for this particular property. The government call allow whoever it wants to come and go. Then you look at exclusive possession. We believe the statute should be read exclusive possession includes rights withheld to the owner.

I guess then it gets to the interpretation that you raised, your Honor, of how do you value. As we read the statute, we read it the same way that Nye did in saying the value is being determined on the full value of the property, and then restricted back down. We believe if the statute were read to be only the possessory benefit that we had, then it would be a constitutional statute, and it could be upheld. Once it extends beyond that for the full value, we believe it's inappropriate. Thank you.

THE COURT: Thank you. You may proceed.

MR. WRIGHT: We have argued -- and I appreciate the Court's comments that this is not a property tax. This is a privilege tax. It's a beneficial use. Even the possessory interest argument that Counsel makes tries to bring it into the realm of a property tax, and it is not.

Obviously if it was a property tax, because it deals with exempt property, it would be unconstitutional. So I think that is absolute key. I think that's recognize in the ABCO case.

The ABCO case, you have the plaintiff in that case who says, "Look, we have leasehold interest. That's all we have. You're taxing us on a fee simple interest, the whole bundle price," and the Supreme Court went through the analysis. It was

certainly under equal protection in federal court, but also operation of laws which is the equivalent of the Utah constitution and said no, it is absolutely constitutional.

Let me step back. The interpretation, the legislative history I think is important. Counsel wants to suggest that in 1987 we have a brand new statute. That is not the case. In our reply brief we have cited to -- we pulled the tape from the Senate from the floor with the comments that were made, and if I could just quote this again, because the way Counsel is interpreting this just does not make sense.

Here's what was done in 1987. It's pretty clear. It's pretty clear by the Senate Bill 69, which is what it is, this (inaudible) phase II recodification. So as they go through their renumbering and they're pulling everything apart, the key is this language. "I would just say this, though" -- this is Dr. Brady speaking to the legislators -- "it has not been our intent to change tax policy as we have completed and entered into this phase II task. When we get into phase III we would probably be addressing such matters as you've just mentioned."

So it's my understanding the tax law will still be read and interpreted the same after these tax bills are passed as they are now. So there's no change anticipated here. There was no change.

As we've cited in our brief, the language which is key to this, that is the language of unless -- this language, "unless

the permitter easement and so on has been consistent in every statute." As you look at the 1959 through the 1975, which are the -- that's the analysis that we initially looked at and went through, it is clear that the statute hasn't changed from 1959 That means Thiokol is absolutely on point.

I have some other arguments that I'd like to get into Thiokol on that, your Honor. Just very quickly, and I will be very quick because you --

THE COURT: Let me just ask a fundamental question to the first argument you raise where you said that they don't have a lease permit or easement. You say they have a contract. I mean are you -- I mean it's hard for me to understand. I mean they have something --

MR. WRIGHT: They do, your Honor.

THE COURT: -- and it's either a lease or permit or --

MR. WRIGHT: And I recognize --

THE COURT: -- I mean a license or -- I mean however you call it, they have an interest in conducting their business on the property.

MR. WRIGHT: They do, and the tax commission found that they (inaudible) that. I'll be candid. It's the weaker of our arguments.

THE COURT: Okay.

MR. WRIGHT: So --

THE COURT: That's fine. I don't need you to say

anymore.

MR. WRIGHT: Okay.

THE COURT: Thank you.

MR. WRIGHT: The comment Counsel made about taxing three times the value of the land again goes to the issue of it's not a property tax, it's a beneficial use. The 1975 language I think is -- can only be read one way. I'd like to suggest to the Court -- and I do have a copy of -- and perhaps the Court does as well of the statutory language that's listed here. The language that was added in 1975 -- let me see if I've got mine right here. If I may, your Honor?

THE COURT: You may.

MR. WRIGHT: The language in the 1975 -- I have it highlighted in red. It reads, "Every lessee, permitee, or other holder of a right to remove or extract mineral covered by the lease, right or permit or easement, except from brines in the Great Salt Lake." I think the Court's indicated well that that is an exception.

This language and the language that follows Great Salt Lake where it says, "is deemed to be in possession of the premises," I would submit that what that says is taxable. Is taxable. That is the language that they used that was understood because if not, it makes absolute no sense. It becomes an absurdity. Statutes are read to have meaning.

What's interesting about that section is it says a

similar right, but it's another mineral, so it's not the same mineral. It's from the same lands. So we have differing mineral interests in the same premises. So the language is deemed to be in possession of the premises, we could substitute, I believe to say, is taxable, notwithstanding the fact that the parties have a similar right to remove, in other words not withstanding that we have parties that operate in the same lands. So that's the essence of what that section says. I think key to this legislative intent is that the statute hasn't changed since 1959.

In respect to the issues here at hand, I would just simply point out that if we look at ATK and how it represents itself to the world, in the -- I think the annual report or the 10-K report -- does this microphone go off and on?

THE COURT: If you get too close to it, it does. You just have to stand back. It's --

MR. WRIGHT: Okay.

THE COURT: It's a temperamental mic.

MR. WRIGHT: All right. If you take a look at the annual report and you look at the 10-K report, ATK represents to the world, if you will, as it's required under the SEC that, "We have -- we occupy this property." Counsel and ATK has said that there's nobody else. There's nobody else. Their argument simply goes to the property owner itself.

What's interesting about the relationship is that this

is -- there is a business relationship, and as an independent contractor with its client, the client is going to want to have the opportunity to make sure its product is there. So what Counsel suggests is management and control is really the client wanting to inspect and wanting to understand. As I go through a series of points with Thiokol, I think you'll see that, because that's what the Court looked at as well.

Our position, and as Counsel has indicated as the Court has reviewed under Bullough as we look at permits, permits can be exclusive or they can be non-exclusive, and that was clearly the law of the state at the time in 1959 that the statute was put into place.

It does not make sense that the issue of exclusive possession would relate to the landowner -- of the exempt landowner because in every instance, whether it's a lease, a permit or an easement, it is a fractional interest in the property, which means that the property owner continues to have rights in the property, rights to control. They have the right to sell. They have the right to do any number of things that they can do. Certainly as was done in this particular case, they can define rights and burdens with respect to the document, the contract itself.

Unless the Court has additional questions -- and let me just interject right here -- it is our position that ATK does not have standing because it's not an agent or an instrumentality of

the United States, and it doesn't have the standing to bring the issues -- the supremacy clause issues. I don't believe that the evidence in the Sutherland case stands for that proposition, because United States was not involved in that case at all.

So having said that, I -- and looking at their reply brief, I think that the -- their challenge -- constitutional challenge under the supremacy clause has effectively been withdrawn or abandoned.

So I would conclude with this analysis with the Thiokol case. In Thiokol the Court determined -- and again, let's go back. Thiokol was producing a product for the US government under contract. They were using the federal premises, just like ATK uses the federal premises. They were an independent contractor, just like ATK is an independent contractor. There was federal oversight in the Thiokol case, just as there is federal oversight by virtue of the nature of the relationship.

I would submit that what we have provided to the Court in the facilities use contract and the capital maintenance contract, and then we have supply contracts, including the Martin -- Lockheed Martin, excuse me, contract for the Tritan II, which has language in it that specifies what the relationship of the parties is.

So as I review the Thiokol case, the Court said, "The above conclusion" -- and this is again that Thiokol has the right to use the property practically as it chooses, because of

necessity it has to. It has a contract that it has to perform. The issue that they've raised about national security -- I hope it's clear -- our understanding is that that concern is ATK's concern as well, in a more significant way because not only do we have the national security concerns, but they are under contract with the government and producing a product that is very essential to our national interests.

I'm reading from paragraph 5 -- or excuse me, Section 5 of the Thiokol case. Does your Honor have a copy of that?

THE COURT: I do.

MR. WRIGHT: Okay. "The above conclusion is not changed by the fact that under the contract the government maintains a staff of about 60 people to supervise such things as security safety measurements, labor relations, accounting, procurement, the company's organizational structure, wages, salary. These measures are quite understandable because of the desirability of safeguarding the interests of the government and the expenditure of such large sums of government money, and more importantly because of the necessity for maximum security in this field vital to national defense, but they are not inconsistent with the main purport of the contract, which is directed towards requiring Thiokol to pursue its own course, to accomplish the end result."

If you look at the contracts, they specify the relationships. They actually have -- include language -- these are the subcontracts or the prime contracts, and ATK subcontract

that says there will not be government interference, and it specifies that.

So we look at the statute, and take the position that ATK clearly has exclusive possession. If it's a permit they have exclusive possession to all the world, and they have the relationship with the Navy. Therefore, the exemption does not apply, and therefore we'd ask that the Court find in favor of our summary judgment.

THE COURT: I need to ask both of you a question because of the way the case was stipulated in Kingsman. Are there questions of fact as to how much the Navy controls or what the Navy does that's different than -- because you both seem to say the same thing. I mean there didn't seem to be in terms of yes, they have the one building there, they have I think what, 14 -- I can't remember the number; I think it's 14 --

MR. WRIGHT: It's 14, yes.

THE COURT: -- individuals that were there. Their role is primarily inspection, maintenance, review of the contracts that ATK does for the Navy, and there wasn't any indication that they do independent works or independent contracts or other contracts. I mean is there -- and I'm just -- I mean from what I have read, there does not appear to be a factual dispute as to what their role --

MR. WRIGHT: That would prohibit --

THE COURT: -- or what takes place --

MR. WRIGHT: -- a summary judgment?

THE COURT: Yes, for purposes of summary judgment. Is there -- neither of you seem to raise -- either of you in your pleadings. I mean you've argued that I should interpret the law either this way or this way, but there doesn't appear to be a dispute of fact that either of you are raising, at least as I've gone through your statements of fact and that you've gone through. Is that a correct statement on both sides? I mean I --

MR. WRIGHT: Your Honor, I think it is subject to our motion to strike and the Court's ruling on that, and reserving also the ultimate fact as to what is the legal significance of that. I don't believe there is a question of fact that would require a further evidentiary hearing. Certainly we take the position that the contracts specify that, and all of that is in the record.

THE COURT: Okay. Thank you.

MR. WRIGHT: I'll respond (inaudible).

THE COURT: Okay.

MR. WRIGHT: Thank you very much.

THE COURT: Thank you.

MR. MCCARREY: At what point would you like to hear from us, your Honor?

THE COURT: Whenever you feel like you'd like to step up and provide your input.

MR. MCCARREY: It might be appropriate now, and then it

would give both of the parties an opportunity to reply.

THE COURT: Okay. You may.

MS. SLOAN: Your Honor, I have a few cases that we (inaudible) in terms of the federal supremacy clause issue, and I have those available for the Court, if the Court would like that. Additionally, we had planned to kind of split the argument, and I would address the federal supremacy clause argument, but if you do not feel that that is necessary, I (inaudible).

THE COURT: No, I'll allow you to do it, but I'll allow the attorney general's office to appear at this time.

MR. MCCARREY: Thank you, your Honor.

THE COURT: Now you're here on behalf of the State Tax Commission, I assume, in the brief that was submitted by the -- on behalf of the State Tax Commission.

MR. MCCARREY: It was, your Honor, and we are here on behalf the administering body. Pursuant to Utah Constitution and statute, the Utah State Tax Commission does have the responsibility to administer and supervise Utah's tax laws, and those responsibilities are particularly heightened in the property tax area, as you are aware.

We ask that as a starting point that your opinion rests on the construction of tax exemptions that they are strictly construed against the tax payer with ambiguities resolved in favor of taxation. That having been said, the case law also does provide that it shouldn't overcome the plain meaning or the

purpose of the exemption. So we believe that that is important.

We think that the exemption needs to be put in the context of the entire statute. We are concerned that the exemption really is being argued almost as a standalone item here, although there has been some mention of the statute, but that when you look at the statute as a whole, really beginning with the first subsection that talks about the possession or other beneficial use and exemption, that implicit in the language is that there is somebody else who does have an ownership interest, that the statute recognizes that interest in the property.

The second subsection talks about how the tax is going to be imposed, the amounts that it will be imposed at, and it talks about as though the possessor were the owner of the property. Again, we feel like that that is really critical language for your Honor to remember as you make your decision that again, on the face of the statute, it clearly recognizes that there is somebody else that has interest in the property.

Finally, it talks about ownership by the federal government. Based on that, we have taken the position that as you interpret exclusive possession. That needs to be exclusive of everyone but the owner of the property. We would agree with the counties and their reading of the ABCO case that while that did arise under a uniform application of laws challenge, that the critical issue there is that ABCO did have less than the full

bundle of rights, the fee interest in the property, and asserted that it should not be assessed at a value based on its use, but equated to the entire value of the property, and the Court just did not agree with ABCO on that particular point.

As far as the other language of the exemption that the use or possession of any lease, permit or easement, while the tax commission did make a finding below on that particular point, it has not taken a position in this particular litigation. It did rule based on the information and the arguments of the parties below, but again, we would ask that there just be a clear framework laid out because we will indeed have to go back and administer this for many properties. Your ruling will impact not only ATK, but it will impact other properties throughout the state.

Finally, in relationship to the supremacy clause argument, the Utah Supreme Court has addressed this issue, the Thiokol case. We hope that the privilege tax issue, aside from the factual issue and the interpretation of the contract and how that works doesn't get lost here, but the legal incidence test that was relied on by the Utah Supreme Court in that particular case is followed.

We believe that the County has properly interpreted and distinguished the federal cases, but in addition to that, we would again underscore a point that you had raised earlier in your questioning of ATK that relates to the 1999 Nye decision out

of Nevada. That is the language of the case. It says, "Much case law suggests that the tax on the use of federal property may be measured by the value of the property itself."

So we certainly think that it's appropriate that you distinguish between the use of the property or the possession of the property versus the ownership of the property, but as the Nye case suggests in that 1999 opinion that it is appropriate to measure the tax by the value of the property itself, and then it relies on two US Supreme Court cases and a Ninth Circuit case, and then goes on to say, "However, the Sixth Circuit has held that the amount of the tax may not exceed the value of the property's use to the contractor."

So we would urge you when choiced with a decision between United States Supreme Court's holdings and what has happened here and that of the Sixth Circuit, that you go with the United States Supreme Court. We believe that that is the appropriate response, and that you limit the Tenth Circuit Colorado opinion just as the -- as the Nye case did that is interpreted that way. That is to distinguish between a management contract versus the type of contract where a party is potentially involved in manufacturing is using that for their business purpose.

The Colorado case relies on the US Supreme Court case, the United States vs. City of Detroit, and then again the Muskegon case, which are really clear that you can measure the

tax by the value of the property.

THE COURT: Can I ask a question on that?

MR. MCCARREY: Yes, your Honor.

THE COURT: That has some interest to me. If the property going through here was an easement with Rocky Mountain Power, you know, for a line that went across there, they wouldn't be taxed at the full value, would they, of the property?

Don't -- I mean because you do that, you -- I mean Rocky Mountain Power may not -- probably wouldn't have fee simple in federal land, but they probably have easements all over the place with federal lands, and they're probably taxed under this provision. So how is Rocky Mountain Power taxed on its easements under this statute that goes across those lands?

MR. MCCARREY: That most likely, your Honor, probably becomes a question of fact based on the methodology that you'd use to determine the value of the property. If you use an income approach, you're going to capture the cash flow of Utah Power and Light --

THE COURT: I'm just asking how the tax commission -- I mean you sit in on a lot of those cases, I know. How does the tax commission assess and -- I mean because we have different rights here under the statute, and that's what I'm trying to kind of grapple with. We have, you know, leasehold interest, we have permit interest and we have easements, and they're all under the same statute.

You know, there's been an argument with this all or nothing, but it appears to me that under that statute it isn't all or nothing because I don't believe easements are taxed. I mean it can be a way to do it, but I don't think we do that. We certainly tax under this statute easements of Rocky Mountain -- I mean water companies. There are a whole bunch of entities that we'd probably tax under this, and I just wonder how -- and I know they don't tax the full amount.

MR. MCCARREY: What they would generally do, your Honor, on a -- in an instance like a Pacific Corp is you would split the two interests, and you would look at, for example, in a lease situation, you would look at a leasehold and lease fee interest. You know, the lease fee interest may be exempt. The leasehold interest is then held by the person who is subject to tax, and you're really going to capture that through your cash flow stream back to the holder of the lease fee interest.

The scenario here where you have -- you make the assumption well, let's assume a property that has a lease, a permit and an easement on it, and the argument was made that the County is going to capture all three of those interests at the full value, you just don't see that type of a case.

THE COURT: No, but it's possible to capture all of (inaudible) more than if just one person owned it fee simple. I mean I'm sure that happens, too.

MR. MCCARREY: You could do that, your Honor.

THE COURT: And I don't think there's any unconstitutional about doing that, if they capture them under different taxes.

MR. MCCARREY: It again, with the methodology that you employ, at least on the state level, you're going to try to separate out the interests and apportion it that way. As far as the --

THE COURT: Well, let me tell you why I'm asking the question.

MR. MCCARREY: Okay. Sure, your Honor.

THE COURT: The statement was made that it's either all or nothing, but if under the statute we don't do it all or nothing in all the parts that are there, is all or nothing the only interpretation as far as the tax commission? I mean do you believe -- I mean you said you wanted me to follow the one case, but is in fact are they doing all or nothing with all -- I mean are they treating leases, permits and easements all -- as all or nothing?

MR. MCCARREY: Our position would be that it really does end up being an all or nothing, your Honor.

THE COURT: Even on easements?

MR. MCCARREY: As far as separate easements, those -- again, you've got to distinguish the types of taxation that the state does. It does the --

THE COURT: No, I understand the type. I mean --

MR. MCCARREY: The unitary assessments and --

THE COURT: No, I understand. I've been to the school and I served for 12 years on the tax recodification commission, and so went through and have spent -- I mean gone through and for 12 years I sat as a member of that commission and we went through and spent a lot of time going through this.

To be honest, that's why I'm asking these questions because I'm trying to understand -- you're asking me to interpret how this statute should be applied. Part of that is understanding how is it applied today. How is it being applied because we have in the same -- and if I give words -- do I give words different meanings? You know, do they have the same meanings?

Is -- and I'm not sure, because I don't -- these are questions I don't know. That's why I'm legitimately asking how the tax -- you represent the tax commission. How are they doing that, because I don't believe from my -- and granted, I have limited knowledge, and it's been awhile since I have been involved in that, you know. In fact, quite a few years since I've been -- but these laws haven't substantially changed since I've been on the bench because all these amendments and everything are -- predate me even coming on the bench when I was on the tax recodification commission.

MR. MCCARREY: Yeah, that --

THE COURT: And so I --

MR. MCCARREY: It's not -- I guess it's not a question that's susceptible to boil down in one simple phrase. It's going to depend on the property interest, it's going to depend on the methodologies that are used, whether they're using an income or cost approach, it's going to depend on how the property is captured on the books and records of a particular entity. Is it in some way being amortized.

There certainly is going to be an effort made to look at the different property interests themselves. However, if you really get to a -- you know, something more basic like a mining interest, generally my understanding is that they're going to use an income approach, and they're going to try to capture the value of that interest, which candidly, is probably going to be the full value, at least on a depleting property. With a property that doesn't deplete, again, that becomes just a much more difficult question.

THE COURT: Okay.

MR. MCCARREY: Other questions, your Honor?

THE COURT: I'm not sure you answered my question, but --

MR. MCCARREY: I'm not sure I have an easy answer for you, your Honor.

THE COURT: Okay. Thank you.

MR. MCCARREY: Thank you.

THE COURT: Do you want to deal with the supremacy

issues, then?

MS. SLOAN: Just briefly, your Honor, I'd like to point out to you that in para -- page 17 of ATK's reply memorandum they state that, "ATK has not requested relief from this Court based on an asserted violation of the supremacy clause, nor has it asserted a claim on behalf of the Navy." So I'm not quite sure where they -- you know, where they actually stand in terms of their pleadings, but it seems pretty clear that they walked away from their supremacy clause argument.

I do have cases that have been referred to in the arguments of Counsel, and I have those for the Court if the Court would like them in terms of the supremacy clause.

THE COURT: Yeah. I mean I've copied -- I have (inaudible) so that I may have already read them. Okay.

MS. SLOAN: Just briefly, I think it's very clear under US Supreme Court precedent in the Muskegon case in US vs. Foyd that measuring the tax, which is measured on the full value of the property is constitutional.

Nye County, of course, is not precedent in this jurisdiction. The Tenth Circuit case, that has been distinguished because it was really based upon a services contract as opposed to a management contract. Even the Tenth Circuit alluded to the fact that had it been a management contract, which is -- or a manufacturing contract, which is what we have here with ATK supplying solid rocket motors, that the

Tenth Circuit may have looked at that differently.

Further, two years after US vs. Colorado, the Tenth Circuit issued US vs. New Mexico. In that case the Tenth Circuit upheld the constitutionality of New Mexico's taxation of federal contractors, sales and use taxes, but it adopted the same standard, which the US Supreme Court ultimately upheld in US vs. New Mexico. US vs. New Mexico is the clear bright line case that the Supreme Court was trying to establish in these governmental immunity cases, and it has not deviated from that since US vs. New Mexico.

So the Ninth Circuit, I would contend, is an outlier case, and the Tenth Circuit, US vs. Colorado was very fact specific because the Tenth Circuit was bothered by the fact that Rockwell International was subject to a privilege tax that exceeded the value of its management contract. So --

THE COURT: It was about double.

MS. SLOAN: It was about double, and so I think that was clearly an influence on the -- had an influence. I agree with the Court, Shelleby vs. Lore is applicable The evidence in the Sutherland case is not because the County wasn't asserting the constitutional rights of a third party in that case, which is contrary to what ATK is doing. Their whole case in terms of supremacy clause relies on the constitutional rights of the United States. So that's --

THE COURT: Okay. Thank you very much.

MS. SLOAN: Thank you.

MR. CRAPO: Did the County want to respond to anything the State Tax Commission stated, your Honor?

THE COURT: (Inaudible)?

MR. WRIGHT: No, your Honor.

THE COURT: Okay. You may proceed.

MR. CRAPO: Thank you, your Honor. I'd like to address a couple of the points that were raised by the County and the State Tax Commission and answer any remaining questions the Court may have.

I'll probably jump around a little a bit and try to hit the points that were raised. First on the legislative intent that was cited by Mr. Wright on behalf of the counties, that was a statement made by Mr. Brady in 1987. I don't believe that Mr. Brady really speaks for the legislative intent. He's not a member of the legislature, and --

THE COURT: No, he spoke for the tax recodification commission as the chairman.

MR. CRAPO: Yeah.

THE COURT: Coming in and explaining why they had made these recommendations of this statute, so I'm very familiar, having served on that with --

MR. CRAPO: Right, and there were several phases to that recodification, as you're aware.

THE COURT: Yes.

MR. CRAPO: It's really interesting to look at the statute. The Supreme Court, which addressed the 1987 statute in the Evans vs. Sutherland case made the statement that apparently the legislature did intend to change the statute and broaden the exemptions for the religious one in subparagraph (c) and for non-exclusive leases and permits, which is Exhibit (d).

So despite what maybe Mr. Brady thought or intended, other phases or whatever, the Supreme Court did decide that there were changes. The thing that's also sort of interesting is you look at the language that Mr. Wright pointed out to you, as you go here, you'll notice in 1959 it talks about mineral and grazing permits issued by the United States or the State of Utah. In 1975 it stays the same. We have subparagraph (d) here.

There's no restriction to the United States or the State of Utah. You also look at subparagraph (c), no restrictions to the United States and State of Utah. They definitely broadened it on that score. They also broadened -- in fact, they broke out grazing, put it at (c), then changed it to agricultural, and then they went to (d).

So despite that fact, it appears, and the Supreme Court has stated -- the Utah Supreme Court -- it appears the legislature did change this in the 1987 recodification to some degree. We believe that should be interpreted in favor of the plain language.

Now we get to the question -- a couple of questions that

were raised on exclusive possession and what does it really mean in the first sentence, and can the first sentence be interpreted. While this only points to subsection (e), I want to talk about (d) as well.

As I stated in my opening statement, we take the position that the language that was added in '75 to remove the minerals from the grazing and move them into subsection (2) or the second sentence, it does appear that the legislature was attempting to tax minerals at that point, exclusive of the brines of the Great Salt Lake.

Now the question then becomes why did they then make the change in 1987 and break it out even further, and did they put grazing in a separate subsection, and then you have subsection (d) down below. We believe that you can read it consistently that the legislature is saying, "Okay, we now have grazing, and we're not even going to require that it be exclusive possession," which is what they have in subsection (d).

Now we have minerals in (e) that we're saying, "Okay, we are going to deem them to have possession." So what does the first sentence of (e) mean? They're saying, "Well, there are other leases out there, and there are other permits out there, and if there isn't exclusive possession of those particular properties, then they should not be subject to tax," which is consistent with the same language of the Great Salt Lake brines because they said they're harvesting the brines, the minerals out

of the water. No one has possession or a particular amount of water that they're flooding in that are particular areas. The legislature states then in (e) there may be other ones where people do not have exclusive possession, and if there are other ones, they're not subject to tax.

THE COURT: I need to ask you one question. You seem to use in your brief interchangeably the words control and possession, that exclusive possession means the right to exclusive control. Now with a lot of leases and permits and particularly that you can have exclusive possession, but it's subject to certain rules and conditions.

For example, if you're down at BYU in BYU housing you can have an exclusive lease to a property, but it's subject to a whole set of rules that it doesn't give you exclusive control of your property, it -- that allows you exclusive possession subject to a number of standards and rules. You seem to use -- do you think there's a difference where you can have exclusive possession but not have exclusive control?

MR. CRAPO: It's a fine point, your Honor.

THE COURT: Well, and it's the fine point that this may turn on.

MR. CRAPO: Right. In Keller --

THE COURT: As I have gone through and looked at your position, because it seems to me that you can have -- but I'd like to hear your argument. Can you -- because I think there are

a lot of cases you can have exclusive possession without exclusive control.

MR. CRAPO: Right. In Keller it talks a little bit about that control language, and that's where we've cited it into the brief.

THE COURT: Uh-huh.

MR. CRAPO: The point being made in Keller and a couple of other cases that were cited there, they said that a lease is going to be deemed to give some exclusive possession to the actual premises that are at issue for time specific and that will be sufficient. They talk about that exclusive possession.

Does that mean that the landlord has given up every single control? Probably not. They still have a control to sell that property. They still have control to be able on a reasonable basis to come in and maybe inspect that property, but the tenant at that point has the expectation that when the landlord shows up at the door they can say, "You cannot come in right now. I have my right to enjoy and to use this property at this particular point. Come back at a reasonable time that is convenient for me and convenient to what we have in our documents."

That, I believe, is distinguishable here with ATK. ATK, one, does not pay any rent, as you're aware, on this. It's a non-interference basis. They're asked to do contracts for the United States government -- the Navy -- to build missiles, and to

make them for them.

Part of the agreement is it says the government is not going to charge them rent. Why? Because they're doing what the government wants them to do with the government's property. If they're going to do something different they have to get special permission through a cross utilization to say may we use this for some other purpose. Then the Navy will decide whether they'll allow it or not.

THE COURT: But doesn't give that -- doesn't that give them, then, exclusive possession for the property for the purpose of the permit? I mean if the permit is to be in that property to build the missiles and do these things -- and like you say, well, if they're going to go back and do something different, they've got to ask the Navy if we can do something different, but doesn't that give them exclusive possession as long as they're doing what the terms of the permit say?

MR. CRAPO: I believe where we would argue that it's different from the Keller versus this one, your Honor --

THE COURT: Okay.

MR. CRAPO: -- is they don't have a right to use and enjoy. Any moment the Navy says, "Stop using, Stark is coming in to inspect," they stop. Any moment the Navy says, "You're not going to be using this property today," they can't use it. When the Navy says, "We're allowing someone else in on the property right now," and we say, "Well, gee, we don't want you in," they

say, "Too bad. Any time, any place, we're the Navy, it's our property. We come in, we use and we're there."

We don't have that right of enjoyment or that control issue. We have a limited right to be able to use it as the Navy dictates us to use it, and we don't have that enjoyment you get under a lease.

THE COURT: But does that language allow you to have that enjoyment to not be taxed, because the language says exclusive possession of the premise to which the lease, permit or easement relates. So if you have exclusive possession and it relates to doing just this --

MR. CRAPO: Right.

THE COURT: And as long as you do just this, you have the right to do that, but if you do this, yeah, they can come in and say do something different, or if you do this, but it still seems like you have exclusive possession as it relates to the terms of the -- either the lease or the permit or the -- it's when you get outside of that that you don't -- and it's your argument that the nature of what they have doesn't give them even exclusive possession within their permit, within the terms of the contract and the permit?

MR. CRAPO: This is where we get to the definition, your Honor, of property --

THE COURT: Okay.

MR. CRAPO: -- that's subject to tax and whether it's

all or nothing.

THE COURT: Okay.

MR. CRAPO: That's where we hit here.

THE COURT: Okay.

MR. CRAPO: Because if you tell me that my permit for ATK is exclusive for the use of this particular drill and this particular building for drilling down a particular motor, I have that at that moment, but I don't have exclusive possession of the other 400 acres or the other buildings that we're not even using. The County is taxing us not on our exclusive possessory use, but they're taxing us on the entire all. So it's all or it's nothing.

When you asked Mr. McCarrey the question what happens at the State Tax Commission, remember, we're dealing with a locally assessed property here by the counties. They use a cost approach and income approach. They do it very different than a unitary approach, which is done at the State Tax Commission. So there is a difference here.

What we end up having at the last section which is subsection (4), it talks about a tax imposed under this chapter is assessed to the possessors or users of the property on the same forms and collected and distributed at the same time and in the same manner as taxes assessed to owners.

Now what they're doing is they're saying, "Okay, we're going to tax you as if you're the owner of the entire property."

We believe that that is inappropriate. It basically reads this out of any exemption for that first sentence. It isn't needed.

THE COURT: So is your claim instead of a supremacy claim an equal protection claim?

MR. CRAPO: It would work that way as you look at ATK's claim would be the equal protection. The United States would be the supremacy.

THE COURT: That's what I mean, but you can only raise ATK's claims.

MR. CRAPO: That is correct, your Honor, and that's the point that was made in Evans and Sutherland.

THE COURT: Okay.

MR. CRAPO: Your Honor, I think if -- the only way to really read this to give this meaning is if you've got a parcel of land and you have a small 10 or 20 percent use with a permit that's exclusive to that 10 or 20 percent, you only should be allowed to tax that portion. It is in essence an all or nothing.

That's why you get to ABCO. If you look at ABCO in paragraph 13 as you read through that, the Supreme Court says, "We're going to analyze on equal protection and on due process the privilege tax just like it's a property tax. They've got to be on equal footing." So you can't say well, just because this is a beneficial use tax it has a different standard applied to it and we can levy it based on a 300 percent rule that we talked about earlier.

So I think the Supreme Court is directing us how to interpret this. I think if we read it as applying to any, you've got grazing above it, you've got any here, and then you've got the mineral down below. I believe that is consistent with the interpretation, and would allow the Court to proceed in a constitutional manner. I'd be happy to answer any questions that you may have.

THE COURT: No, I think you've covered it. I mean this has been very thoroughly briefed. I appreciate all --

MR. CRAPO: Thank you.

THE COURT: -- parties' arguments

MR. CRAPO: Thank you, your Honor.

THE COURT: Does the County have anything else that you wish to -- any of the -- or the attorney general's office?

MR. MCCARREY: Can I just touch on a couple of points, and then if you want -- if Counsel wants to follow up.

THE COURT: Yeah, just's quickly.

MR. MCCARREY: Okay.

MR. CRAPO: If it's something new I would like to comment on it.

THE COURT: Okay. I will allow you. I'm not going to cut anybody off.

MR. MCCARREY: I guess at one point I did miss on Ms. Sloan's is I just wanted to point out that the Evans and Sutherland case does come after Shelleby, and I believe I made

that point clear, but --

THE COURT: Yes.

MR. MCCARREY: -- that's the case we would refer you to.

THE COURT: Okay. Thank you.

MR. WRIGHT: I would just like to clarify that ATK is taxed on property that it uses, and we've got that set out in the facts. If you were to take --

THE COURT: Well, the facts say I think, what, there are 181 pieces of property, and they use --

MR. WRIGHT: Yes, and some don't have value and --

THE COURT: Yeah, I think there's 15 that they don't use, and then one building that the Navy uses, and so --

MR. WRIGHT: Correct. I just wanted to clarify that I think Counsel misspoke on that issue. Well, your Honor, I think the Court has addressed the issues and concerns. The Evans and Sutherland case, the statement in there, you have to read the language -- it is dicta, first of all, but then the way they read it, I don't believe that they're reading it to say in 1987 we have a brand new statute. I don't believe that.

If you take their argument to an extreme, you could never have a privilege tax on any property. So we -- I respectfully disagree.

THE COURT: Thank you.

MR. WRIGHT: Thank you.

THE COURT: Anything else?

MR. CRAPO: I don't think that opens anything up, your Honor.

THE COURT: Okay. Thank you. Thank you for all the parties and the good work that you have done. I will be issuing an opinion. It will probably be closer to the 60 days than 30 days by the time we finish it, but I will -- because it has to be, I think, fairly thorough.

I need to ask you so I clarify with you, you don't believe there are any factual issues that would require a further hearing. I asked that of the County and they said no.

MR. CRAPO: Yes, and I didn't --

THE COURT: And you didn't. Because I mean that's -- I just want to clarify that for the record.

MR. CRAPO: Procedurally I believe you have enough to rule on summary judgment based on what you have. However, if the interpretation of the Court were to go and say do we not have full control of the premises by defining the premises to the exclusive, you'd probably need additional factual information to say what control do you really have and what parts of the property don't you utilize. That's not before you at this point.

THE COURT: Okay. What is before me is they don't utilize all the buildings.

MR. CRAPO: Correct.

THE COURT: So what I have before me, I mean factually, is that they don't utilize all of the buildings. Out of 181

buildings there are 14 that they don't utilize.

MR. CRAPO: Correct.

THE COURT: So I have to assume that as fact because you're both agreed to that as to where we are.

MR. CRAPO: That's correct, your Honor.

MR. WRIGHT: And we have taxed only the property that ATK uses.

MR. CRAPO: That's not a fact before you, your Honor. That's not been alleged in any --

MR. WRIGHT: It's a fact that we've got -- that we've put in that I think they've agreed to. I think it's paragraph 12.

THE COURT: Okay. Let me look at that. That is a -- paragraph 12 of your --

MR. CRAPO: Of your brief, Kelly?

MR. WRIGHT: Actually, paragraph 16, your Honor.

MR. CRAPO: Of yours?

MR. WRIGHT: Yes. Yes. This -- if you wanted to go to the motion for summary -- or the summary judgment, the very initial brief, it was included in the reply brief as well.

THE COURT: Okay. So it is your motion, and it's paragraph 12?

MR. WRIGHT: No, I'm sorry, 15 and 16.

THE COURT: Okay. So 15 --

MR. CRAPO: Of your memorandum.

THE COURT: All right. It says, "The Nyroit property at ATK (inaudible) is comprised of six parcels that constitute 528.48 acres, 181 improvements owned by the US. Alliant uses 161 improvements at Nyroit in connection with its business to fulfill and perform its government contract. The uses and features of the structures within Nyroit are similar to the ones at plant one. Of the 181 improvements, 15 no longer contribute value, 6 contribute less than 1,000, 16 contribute less than 5,000. Consequently" -- so what you're saying is that the only thing that you are taxing is -- the 144 constitute 99.7 percent of the value, and that 15 you're putting at no value, 6 less than 1,000 each and 16 less than 5,000 each.

MR. WRIGHT: Correct.

THE COURT: Okay. So -- okay. So that is a fact that's in part of the record.

MR. WRIGHT: That is a fact, yes.

THE COURT: Okay. Thank you. Okay. Thank you very much.

MR. WRIGHT: Thank you.

MS. SLOAN: Thank you, your Honor.

THE COURT: The Court is in recess.

(Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

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Natalie Lake
Official Court Transcriber

WITNESS MY HAND AND SEAL this 30th day of June 2010.

My commission expires:
February 24, 2012

_____
Beverly Lowe
NOTARY PUBLIC
Residing in Utah County